TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1922

No. [redacted]83

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

W. H. SETTLE AND GEORGE W. CLEPHANE, PARTNERS UNDER THE FIRM NAME AND STYLE OF W. H. SETTLE & CO.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED MAY 30, 1923.

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No. 919.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 23, 1921.

The District Court of the United States

Southern District of Ohio, Western Division.

RECORD.

PETITION.

Filed August 31, 1918.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, Plaintiff,
No. 2724. vs.
W. H. SETTLE and GEORGE W. CLEPHANE, partners under the firm name and style of W. H. SETTLE & CO., Defendants.

Plaintiff is a corporation duly incorporated under the laws of the State of Ohio. Plaintiff owns and operates a line of railroad extending from Cincinnati, in the State of Ohio, to Louisville, in the State of Kentucky, and to other points in various states of the United States, and is engaged in commerce between the states as a common carrier by railway.

Defendants are and were at all times hereinafter mentioned partners engaged in manufacturing and dealing in lumber at the Madisonville Station, being a station situated within the city limits of the City of Cincinnati on the line of railway of this plaintiff.

At the various times mentioned in the petition there were in force, duly filed with the Interstate Commerce Commission and published as required by law, freight tariffs fixing the rates of freight between the points of origin of the several shipments, mentioned in the account hereto annexed marked "Exhibit A" and made part hereof, and the City of Cincinnati in the State of Ohio; and at said times there were likewise in force freight tariffs duly filed with said Interstate Commerce Commission and published as required by law, between the points of

origin of said several shipments and the Station of Madisonville in the State of Ohio.

By the rules and regulations of this plaintiff and other carriers, applicable to all shipments from the point of origin of each of the said several shipments, and which rules and regulations were duly filed with the Interstate Commerce Commission and published as required by law, it was provided that all shipments consigned to Oakley, Ohio, should be shipped to and delivered at said Oakley at the rates applicable to shipments to Cincinnati, Ohio.

At the time each of the several shipments mentioned in the account, hereinbefore referred to, was made, and at the time each of the said shipments reached its destination, there were in force, duly filed with the Railroad Commission or the Public Service Commission of the State of Ohio, and published as required by the laws of the State of Ohio, local rates upon shipments, of the class mentioned, from Oakley, Ohio, to Madisonville, Ohio, which said rates were in full force and effect as to shipments originating at said Oakley and destined to said Madisonville, being shipments within the State of Ohio; but said rates had not been filed with the Interstate Commerce Commission, nor had they been published as required by the Act to Regulate Commerce, and the same were not in force nor valid rates with respect to any shipments among the several States of the United States.

Plaintiff says that at various times during the years 1913 and the succeeding years, certain shipments were made, some of which shipments were consigned to defendants at Oakley, Ohio, by the order and direction of said shippers, and for which bills of lading or other contracts of shipment were issued at the points of origin of said shipments, and which bills of lading or other contracts showed the defendants as the consignees thereof and Oakley, Ohio, as the destination thereof; and certain other shipments were also made from various points to Cincinnati, Ohio, or other points north of the Ohio River, and in which shipments the shippers, certain lumber brokers or other parties, are shown as the consignees thereof, which said shipments were purchased by the defendants in transit and before the same reached Cincinnati, Ohio, and that the defendants ordered the lines bringing the cars containing such shipments into Cincinnati to have the same delivered to the defendants at Oak-

ley, Ohio. Plaintiff says that a complete list of said shipments, hereinbefore referred to, is hereto attached marked "Exhibit A" and made part hereof.

Plaintiff further says that defendants paid to the various southern lines hauling the cars mentioned in said statement to Cincinnati the full interstate rates on all of such cars and then ordered said cars to be delivered to the defendants at Oakley, Ohio, defendants being entitled to have the same delivered at Oakley, Ohio, at the same rate as at Cincinnati, Ohio. Plaintiff further says that none of said shipments on arrival at Oakley, Ohio, was received by the defendants, but that immediately upon the arrival of each of said shipments at Oakley, Ohio, the same were placed upon team tracks of this plaintiff at said Oakley, Ohio, and the defendants thereupon immediately notified of the arrival thereof; and that immediately thereafter, in each case, defendants directed the same to be forwarded to Madisonville, Ohio, under a new bill of lading or contract of shipment.

Plaintiff further says that in some cases new bills of lading were made out by the defendants for such shipments from Oakley, Ohio, to Madisonville, Ohio, and the same were signed by the agent of this plaintiff at Oakley; and in certain other cases no bills of lading or contracts of shipment were signed. Plaintiff further says that defendants did not, at any time during the movement of said shipments or before shipment or after their arrival at Oakley, intend to receive or unload any of said shipments at Oakley; but that defendants at all of said times intended to receive and unload said shipments at Madisonville, aforesaid. That defendants had at Oakley no yards, mills or other facilities for the receipt of freight, and that their yards and other facilities for unloading and receiving shipments of lumber were situated at Madisonville and not elsewhere. Plaintiff further says that said shipments were so made to said Oakley, Ohio, and were reconsigned to said Madisonville, Ohio, as hereinbefore described, for the purpose of securing, by the combination of the rates to Cincinnati, Ohio, and from Oakley, Ohio, to Madisonville, Ohio, as aforesaid, lower rates than the through rates from the points of origin of said shipments to Madisonville, filed with the Interstate Commerce Commission.

Plaintiff further says that the rates charged upon each of said shipments and paid by the defendants consisted

of the rates from the point of origin to Cincinnati, Ohio, the same being applicable to Oakley, Ohio, as hereinbefore set out, together with the rate published and filed with the Public Service Commission of Ohio from said Oakley to Madisonville, which said rate was less than the true rate properly applicable to each of said shipments and which ought to have been charged for the transportation thereof; whereas the plaintiff says that the true rate properly applicable to each of said shipments was the rate named and published as being the through rate from the point of origin of each of said shipments to Madisonville, Ohio, in the tariffs hereinbefore mentioned. That the date of each of said shipments; the weight thereof; the number and initials of the car in which the same was transported; the amount paid for the transportation thereof; the amount which should have been paid for the transportation thereof, and the difference between said amounts, are shown in detail in the account hereto attached, marked "Exhibit A" and made part hereof.

Plaintiff says that by reason of the foregoing the defendants are indebted to plaintiff in the sum of One Thousand Three Hundred and Thirty-nine and 88/100 Dollars ($1,339.88), with interest from the 21st day of January, 1915, for which the plaintiff prays judgment.

Harmon, Colston, Goldsmith & Hoadly,
Attorneys for Plaintiff.

State of Ohio, County of Hamilton, ss:

George Hoadly, being first duly sworn, says that he is one of the attorneys for the plaintiff in the above entitled action; that plaintiff is a corporation, and that the statements of the foregoing petition are true, as he verily believes.

Geo. Hoadly.

Sworn to before me and subscribed in my presence this 31st day of August, 1918.

(Seal.)

Eugene Brunsman,
Notary Public, Hamilton County, Ohio.

AMENDED ANSWER.

Filed April 12, 1920.

Now come the defendants and for answer to plaintiff's petition admit that plaintiff is a corporation duly organized under the laws of the State of Ohio, and that said plaintiff owns and operates a line of railroad as set forth in said petition, and is engaged in commerce between the states as a carrier by railway.

Defendants further admit that they were partners engaged in the dealing of lumber at Madisonville, as set forth in plaintiff's petition.

Defendants further admit that at the various times mentioned in plaintiff's petition, there were duly filed with the Interstate Commerce Commission, freight tariffs, fixing the rates as set forth in plaintiff's petition.

Defendants further admit that all shipments as set forth in plaintiff's petition showed the defendants as consignees at Oakley, Ohio, as the destination thereof, and that it was provided that all of said shipments consigned to Oakley, Ohio, should be shipped to, and delivered at Oakley, at the rates applicable to shipments at Cincinnati, Ohio.

Defendants further admit, as set forth in plaintiff's petition that there were local rates upon the shipments, of the class mentioned, from Oakley, Ohio, to Madisonville, Ohio, being shipments within the State of Ohio.

Defendants further admit that at various times during the year, 1913, and succeeding years, certain shipments were made to the defendants at Oakley, Ohio, at the order of said defendants and for which bills of lading, or other contracts of shipment were issued at the point of origin of said shipments, and which bills of lading and other contracts showed the defendants as consignees at Oakley, Ohio, as the destination thereof, and certain other shipments were also made from various other points to Cincinnati, Ohio, or other points north of the Ohio River, and in which shipments, the shippers being certain lumber brokers or other parties were shown as the consignees thereof, which said shipments were purchased by these defendants in transit, and before the same reached Cincinnati, Ohio, these said defendants ordered the lines bringing the cars contain-

ing said shipments, to have same delivered to these defendants at Oakley, Ohio.

Defendants further admit that they paid to the various southern lines hauling the cars mentioned in said statement set forth in plaintiff's petition, to Cincinnati, the full interstate rate on all of such cars, and then ordered said cars to be delivered to these defendants at Oakley, Ohio, these defendants being entitled to have the same delivered at Oakley, Ohio, at the same rates as Cincinnati, Ohio.

Further answering, defendants deny "that none of said shipments on arrival at Oakley, Ohio, was received by the defendants," but aver that all of said shipments on arrival at Oakley, Ohio, were received by these defendants.

Further answering defendants say that upon the arrival of each of said shipments at Oakley, Ohio, the same were placed upon the team tracks of the plaintiff herein, at said Oakley, Ohio, and thereafter the defendants directed the same to be forwarded to Madisonville, Ohio, under a new bill of lading or contract of shipment.

Defendants further say that on all of said shipments, the plaintiff made a trackage charge of two ($2) dollars a car on each of said cars for making the delivery on the public team tracks at Oakley, Ohio, which charge was collected by said plaintiff, and that upon all of said cars, which were not reconsigned from Oakley, Ohio, to Madisonville, Ohio, as aforesaid, within twenty-four hours (the same being the free time allowed for re-consignment of car load freight); said plaintiff charged said defendants demurrage or car service, at the rate of one ($1) dollar per day, on the cars so detained beyond the said free time limit, and that the same was paid by these defendants, and that said plaintiff likewise charged demurrage on all of said cars at Madisonville, after the free time allowed for unloading the same, to-wit: forty-eight hours, which charges these defendants paid.

Further answering, defendants deny that in some cases new bills of lading were made out for such shipments from Oakley, Ohio, to Madisonville, Ohio, and that the same were signed by the plaintiff's agent at Oakley, and that in other cases no bills of lading or contracts of shipment were signed.

Defendants further deny that they at any time during the movement of said shipments, or before ship-

ment, or after their arrival at Oakley, Ohio, did not intend to receive or unload any of said shipments at Oakley.

Defendants further say that the Interstate Commerce Commission had held that the interstate rate from the points of shipment to Madisonville, Ohio, could not exceed the combined interstate rate to Cincinnati, and the local rate from Oakley, Ohio, to Madisonville, and that the rates being charged by the plaintiff was in excess of said combined rates and therefore unlawful.

Further answering, defendants deny each and every other allegation contained in plaintiff's petition, not herein specifically admitted.

Wherefore, defendants pray that plaintiff's petition be dismissed at plaintiff's costs, and for all other necessary and proper relief, to which they may be entitled.

W. W. Clippinger,
Attorney for Defendants.

State of Ohio, Hamilton County, ss:

George W. Clephane, being first duly sworn, says that he is one of the defendants in the above entitled action and that the statements contained in the foregoing answer are true as he verily believes.

George W. Clephane.

Sworn to before me and subscribed in my presence this 10th day of April, 1920.

(Seal.) W. W. Clippinger,
Notary Public in and for Hamilton County, Ohio.

VERDICT.

Filed April 29, 1920.

We, the Jury, herein do find the issues joined in favor of the defendant.

Signed, Albert Brant, Foreman.

Motion for New Trial.
Entry Overruling Motion for New Trial.

MOTION FOR A NEW TRIAL.

Filed May 1, 1920.

Now comes the plaintiff and moves the court to set aside the verdict heretofore rendered herein and to grant a new trial of this action, for the following reasons:

1. The verdict is not sustained by sufficient evidence.
2. The verdict is contrary to law.
3. Error of law occurring at the trial and excepted to by plaintiff.
4. The court erred in its charge to the jury; to which the plaintiff at the time excepted.

Harmon, Colston, Goldsmith & Hoadly,
Attorneys for Plaintiff.

ENTRY OVERRULING MOTION FOR NEW TRIAL AND JUDGMENT ON VERDICT FOR DEFENDANTS FOR COSTS.

Filed May 11, 1920.

This cause coming on for hearing on the motion of plaintiff to set aside the verdict and for a new trial herein, the court, on consideration thereof overrules the same. It is therefore considered by the court, that the said defendants go hence without day and recover from the said plaintiff their costs herein expended, to all of which the plaintiff excepts.

Peck, J.

BILL OF EXCEPTIONS.

Filed September 14, 1920.

Be it remembered that at the trial of this cause at the April Term, A. D., 1920, of the District Court of the United States, before the Honorable John W. Peck and a jury, the plaintiff, to maintain the issue on its part, called as a witness

Pearl M. Grate,

who being duly sowrn testified as follows:

My name in full is Pearl M. Grate. I live in Oakley, Cincinnati, Ohio. I am agent for the Baltimore & Ohio Southwestern Railroad at Bond Hill, Ohio, and have been such agent about five years past. I was agent for the B. & O. S-W. R. R. at Oakley from 1910 or 1911 until about five years ago. I was such agent in the years 1913, 1914 and 1915. My duties as such agent were to receive and forward freight and handle all freight business of the company at Oakley; collect all charges due the B. & O. S-W. R. R. Co., and to prepare shipping instructions for train crews as to the movement of cars, and to prepare notice to the agent at point of destination as to amount of freight to be collected.

The shipments involved in this controversy mostly came from the south over the Louisville & Nashville and Southern Railroads, but a few came from the South over the line of the B. & O. S-W. R. R. The shipments which came into Cincinnati over the L. & N. and Southern, came to Oakley with freight charges prepaid by the line over which they came. That road would collect the charges into Cincinnati and pay our charges for transporting the freight from Cincinnati to Oakley. With reference to shipments which came from the south over the B. & O. S. W. by way of New Albany and other gateways, the charges were to be collected by me. I had nothing to do with the collection of charges with reference to any of the other shipments. When shipments arrived at Oakley, the first thing done was to notify the consignee that the shipment was at Oakley. In some cases the shipments were placed on team tracks. In others they were not but were held in what is called the the bulk yard; and in all cases in the statement herein

designated as Plaintiff's Exhibit No. 1 these cars were ordered forwarded to Madisonville. This statement was prepared in my office by Mr. Asher and Mr. Hall from the records of my office. Cars were receipted for by Messrs. Settle and Clephane as having been delivered to them at Oakley, and thereupon they presented me with a bill of lading for each car to cover the movement of the car from Oakley to Madisonville. I do not remember whether these bills of lading were made out by them or in my office, although in some cases I do remember that they came to my office and made the bill of lading out there. It is the practice to furnish shippers with pads of these bills of lading, so that they may prepare them either in their own place of business or in the office of the railroad agent. They made out these bills of lading themselves, and such bills of lading were not made out by any officer or agent of the railroad company. These bills of lading were in some cases signed by me or by some other person for the Baltimore & Ohio Southwestern Railroad Company and in some cases they were not. In the early part of the transaction they were signed, and in the latter part they were not. As soon as I got the bill of lading I would proceed to make the necessary arrangements to have the cars taken over to Madisonville. I would prepare a document which we call a way-bill, which is the authority for the conductor to move a car from Oakley to Madisonville, and also an advice to the agent at Madisonville showing the weight and amount of freight charges that he should collect on the shipment. These cars were taken away from Oakley and taken to Madisonville.

And upon cross examination he testified:

If the cars remained at Oakley for more than twenty-four hours, a charge was made for demurrage on them; and also a team track charge of two dollars for all cars which were put upon a team track.

And in answer to a question by the court, the witness said:

I can not say definitely from memory, but I think that the records would show that none of the cars embraced in this claim were actually placed upon the team track, although it is possible that a few may have been. The team track is on one side of the main line and the bulk yard is on the other side. The cars always came in first

to the bulk yard, even though they were finally placed on the team track, and in the great majority, at least of the cases embraced in this claim, the cars never left the bulk yard until they were ordered to Madisonville.

Upon further cross examination the witness testified: If any cars of the defendants were put on the team track it was done at the request of the defendants.

And thereupon the witness was asked the following question by counsel for defendants:

"I asked you, Mr. Grate, if it isn't true that during the time you were agent at Oakley that the defendants, Mr. Clephane and Mr. Settle, received a number of cars there and unloaded them there?"

To which question the plaintiff objected, which objection was overruled by the court, to which action of the court in overruling said objection the plaintiff then and there excepted.

And thereupon the witness answered:

"I would not like to say it was not true, but I must say I do not recall them unloading any. If there were, I am sure there were very few indeed."

The witness further testified upon cross examination: I could not say definitely that there were none received and unloaded by the defendants at Oakley without having the records of the Oakley office before me. When these cars were received at Oakley I notified the defendants that the cars were there, and they would come to Oakley and a new bill of lading would be issued, and they were shipped then to Madisonville under a new bill of lading. I used the regular published local rate on the bill of lading from Oakley to Madisonville on the new bill of lading.

When these cars came into Cincinnati over southern roads other than the B. & O. S. W. R. R., they came into Oakley with all charges, including those of the B. & O. S. W. up to Oakley, prepaid, and I had nothing to do with the collection of freight charges. There were some few cases in which the cars came over the B. & O. S. W. from New Albany or other points, and in those cases I collected the freight charges up to Oakley in the regular course of business from Messrs. Settle and Clephane. They were on the credit list and bills were rendered to them for all their charges once a week. None of these cars were shipped through Oakley in the train in which they arrived there. They were all switched off at Oak-

ley and held there until instructions were received to ship them to Madisonville.

The new bills of lading were made out either at the office of Settle & Clephane or at my office at the time the car was ordered reshipped to Madisonville, and none of these cars were sent forward to Madisonville without new bills of lading. When the cars arrived in Cincinnati over lines other than the B. & O. S. W. we did not collect the two dollars team track charge.

Thereupon the plaintiff further called as a witness

P. D. Freer,

who being duly sworn testified as follows:

I am general freight agent of the Baltimore & Ohio Southwestern Railroad Company and have been such general freight agent for about two months. I was assistant general freight agent for a year, and prior to that I was division freight agent at Cincinnati for about two years. Before that I was division freight agent at Chillicothe and Dayton, and prior to that I was in the general freight agent's office here at Cincinnati for about fifteen years.

Upon further examination of the shipments sued for in this case I find there are sixty cars the claim for which is a mistake and which should be eliminated from the claim. I have identified these in the statement by a blue check mark and a blue circle around the amounts due. This reduces the amount of the claim by $504.74, leaving the net amount $835.14.

I further find that there is an overcharge in one instance of 80 cents, which makes a further deduction to a total of $834.34, which is the amount now due.

I have checked up these charges as against the tariffs in force at the time, and the tariff references are all shown on the statement.

And thereupon the court instructed the jury that it was conceded by the plaintiff that the amount claimed should be reduced by said sums of $504.74 and 80 cents, and that the jury should be governed accordingly, and said amounts should be excluded from the claim of the plaintiff.

The witness further testified:

The remainder of these charges, which I have not cut out as indicated by pencil check marks, are correct

charges and ought to be paid, based on tariffs then in force which applied from the point of origin to Madisonville. There were in these cases through tariffs published at the point of origin and filed with the Interstate Commerce Commission. In the other cases there were not. The statement shows the amount which the defendants actually paid and the amount they ought to have paid.

And thereupon the statement referred to by the witness was offered in evidence and a true copy thereof is hereto attached marked Plaintiff's Exhibit No. 1 and made part hereof.

In all cases in which I have not cut out the charges from this statement there were through tariffs published and on file with the Interstate Commerce Commission from the points of origin of the original shipments to Madisonville, and there were also at the same time through tariffs published and on file from the point of origin to Cincinnati. The tariffs from competitive points on the lines of the Louisville & Nashville and the Southern Railway provided that Oakley, for the purposes of such shipment, was a part of Cincinnati, and that the line of railway bringing such shipment to Cincinnati would absorb or pay the switching charges of the Baltimore & Ohio Southwestern Railroad between Cincinnati and Oakley, so that such shipments were delivered at Oakley at the same rate as at Cincinnati; such charges so absorbed by the Southern lines including the team track charge. In other words, the consignee on all such shipments paid no part of the charge above the Cincinnati rate when the shipments went to Oakley.

Thereupon the court asked the witness the following question:

"I want to ask you a question. As to this $834.34, these charges upon which you make that difference, in those cases, those shipments, each of them, was the tariff, the published tariff, the same to Cincinnati and to Oakley?

A. Well, I don't like to answer that definitely. I think it was, because from the points at which through rates were published they would ordinarily be in their territory considered competitive, but I wouldn't say definitely.

Q. That is the question I was about to come to, Your

Honor. Were these shipments from competitive points or non-competitive points?

A. I could answer by examining that statement.

The Court: Examine it.

Q. I wish you would examine that statement and say how many there were from competitive points.

A. In other words, you want to know, where the through rates were published to Madisonville, whether the through rates applied to Oakley?

The Court: Yes.

A. (After examining Exhibit No. 1): No, it did not. There is one right there (indicating). In the majority of cases it did, but there are a few of the cases here where the rates to cover were made by the addition of our switching charge and the Cincinnati rate. At the same time there was a through rate to Madisonville.

The Court: So that their rate to Oakley was, in the majority of cases the same as to Cincinnati, but in some cases a switching charge to Oakley was added?

A. Yes, Your Honor.

The Court: Would that be a correct statement?

A. That is correct."

And thereupon the witness further testified in chief:

In all cases embraced in this statement where the switching charge to Oakley was added, that amount has either been credited in the statement or the car has been eliminated from the statement, so that the amount claimed in this case is only the difference between the rate to Oakley and the rate to Madisonville.

And upon cross examination the witness testified:

I assumed the position of general freight agent on the first day of March of the present year. Mr. S. T. McLaughlin was general freight agent before me.

The defendants had a right to have these cars delivered at Oakley as well as at Cincinnati.

And thereupon the witness was asked the following question:

"Q. Isn't it true, also, that Cincinnati is considered the end of the division, that is, the Ohio River is the dividing line, and that ordinarily Cincinnati would be the terminus of shipments made from the south?

A. I don't quite understand your question.

Q. In other words, the rates north of the Ohio River are based on a different rate than on those from the

south? In other words, the shipments that are being made over other lines would be treated on a different basis after they crossed the Ohio River, would they not?

A. I don't understand what you mean. The normal basis for making rates from the south to the north is a combination on Cincinnati, if that is what you mean.

Q. Cars being shipped, for instance, to Toledo would be figured on a different basis, would they not, than those that were terminated at Cincinnati?

A. Yes, the rate to Toledo would be made on a combination to Cincinnati, the same as the rate to Madisonville is made.

Q. Now, these cars were all treated by your company and by the defendants as shipments to Oakley, were they not?

A. When they were received they were, yes.

Q. Received there and delivered at Oakley by your company and received by the defendants there?

A. Well, I wouldn't say they were delivered there.

The Court: I couldn't hear you.

A. Well, I wouldn't say they were delivered there. They were not actually delivered. Constructive delivery may have been taken, but they were not delivered. Nothing is delivered until it is unloaded and removed from the property."

And the witness further testified on cross examination as follows:

I do not consider that a car is delivered when it is placed on team track at destination. If a car is shipped to Cincinnati and placed on a team track the consignee pays the freight there, and then later re-bills the car and ships it to some point other than Cincinnati, that I think would be considered a delivery at Cincinnati. It is not a requisite that the car should be unloaded.

I had nothing to do with the preparation of the facts in the former petition. In a general way I am familiar with the facts. I have no knowledge about the suit which was passed upon by the Circuit Court of Appeals.

Of the cars remaining in the statement, demurrage was charged on the following:

C. & O. 4616, forwarded from Oakley March 17, 1913.

Southern Railway, 39685, forwarded from Oakley March 17, 1913.

C. M. & St. P., 200354, forwarded from Oakley September 15, 1913.

Mobile & Ohio, 13592, forwarded from Oakley March 20, 1914.

These are the only cars remaining in the statement on which there was a demurrage charge.

The statement does not show team track charges. We know that team track charges were assessed on every car that went out to Oakley, but, as I have before explained, in the majority of cases this charge was absorbed by the southern roads out of their Cincinnati rate; that is, it was allowed or paid by the southern road which delivered the car to Cincinnati. I am familiar with the rate from Madisonville to Oakley, which was in effect during this period. When these cars were shipped from Oakley to Madisonville the defendants paid the tariff at that time. In the majority of cases the rate from the point of origin to Madisonville was in excess of the combined rate from the point of origin to Oakley with the rate from Oakley to Madisonville added. From September 21, 1912, to November 16, 1914, which covers a large part of the period included in the statement, we had in force a rate of one cent per hundred pounds on lumber from Oakley to Madisonville. This rate carried no restrictions of any sort in its application, and was filed with the Interstate Commerce Commission and with the State Commissions. The result of that was the elimination of sixty cars which have been eliminated from this statement because on these cars there were no published through rates. But upon those which remain in the statement, there was a published tariff from the point of origin to Madisonville, which we contend was the rate applicable. On interstate traffic there is only one tariff, and that is the through tariff from the point of origin to the point of destination. It makes no difference what rate would be obtained by applying combinations of local rates.

And thereupon the plaintiff, further to maintain the issue on its part, called as a witness

George W. Clephane,

who, being first duly sworn, testified as follows:

I am one of the defendants in this case and am engaged in the lumber business at Madisonville and have been so engaged for about ten years. The firm of Settle

& Clephane, composed of Mr. Settle and myself, has been in existence since before the time when the shipments involved in this controversy were made. We have been engaged in buying and selling lumber and receiving shipments of lumber from the south. We have a lumber yard at Madisonville and there is a switch leading into it. We have not, nor had we at the time of these shipments, any lumber yard at any other place. We have an office on Whetsel avenue; another one at the lumber yard in East Madisonville, and another one at Hyde Park. Our business is mainly retail. We have no mill, and simply sell lumber as we receive it. We do no mill work. Some of the shipments in question were bought before they were shipped. Others were bought from dealers or otherwise after they had been shipped and while they were in transit. Some of the shipments were consigned to Oakley; some of them to Cincinnati; some of them it is possible might have been consigned to other places and the destinations changed to Oakley or Cincinnati. If they were consigned to Oakley they came to Oakley direct. If they were consigned to Cincinnati they were sent to Oakley on our order. The bulk of our business is received and unloaded by us before it is sold. The cases in which we have a car of lumber sold before it arrives at Cincinnati form a comparatively small part of our business. In some of these cases, before the shipments were purchased, we knew and intended that they should go to Madisonville. With reference to the shipments involved in this case, they were intended to go to Madisonville, and the cars involved in the controversy were intended from the beginning to go to Madisonville.

Upon cross examination the witness testified:

During the years involved in this controversy we were doing some business at Oakley. We unloaded some cars at Oakley. We would have cars shipped to Oakley, and if there was any demand for lumber there we would unload it there; if not, we would rebill it to Madisonville. We made out bills of lading and had the cars shipped from Oakley to Madisonville. We paid demurrage charges at Oakley. We paid team track charges on some of the cars at Oakley. These cars were mostly shipped from the south, and we had the privilege of having them delivered at Cincinnati or Oakley under the Cincinnati

rate. We paid freight on the new bill of lading after the car arrived at Madisonville.

And thereupon the witness

P. D. Freer,

being recalled for the purpose of correcting an error in his former testimony, testified as follows:

The four cars mentioned in this statement which next precede the last, were not covered by through rates from the point of origin. That statement is a mistake. These cars should remain in the statement because there was an error made in billing them from Oakley to Madisonville at the rate of 3.2 per hundred pounds when they should have been billed at the rate of 3.7 per hundred pounds, so that there is an undercharge of a half cent per hundred pounds. The cars are as follows:

January 15, 1915, Erie car 90195; same date, N. O. & N. E. car 14583; January 16, 1915, A. G. S. car 12801; January 23, 1915, N. O., M. & C. car 4320.

The entire amount of undercharge on these four cars is $9.24. To make it definite, beginning at the end of the statement the last car is not one of these which I have mentioned, but it is the next four before the last car.

And thereupon the court instructed the jury that the plaintiff's claim should be further reduced by the sum of $9.24 on the four cars concerning which claim appears in the statement for an erroneous undercharge, because this is not pleaded in the petition.

And thereupon the witness further testified as follows:

I do not know, although I suppose that all the cars remaining in the statement were consigned to defendants at Oakley. I have no record that would show that to be true. The only record I have here is the record which shows the movement from Oakley to Madisonville. We do not know to whom they were consigned at Cincinnati. They might have come in consigned to the defendants or to Settle & Clephane.

And thereupon, pursuant to instructions of the court, the witness indicated upon the statement Exhibit No. 1 by blue pencil the four cars with reference to which he had just testified.

And thereupon the plaintiff rested its case.

George W. Clephane.

And thereupon the defendants, to maintain the issue on their part, called as a witness

George W. Clephane,

who further testified as follows:

I am one of the defendants in this case. We were advised of the arrival of the cars, which were delivered at Oakley, by postal card notice from the agent at Oakley that the car was at Oakley awaiting disposition. We could not tell until the cars arrived at Oakley whether we would have demand for the lumber at Oakley. We treated Oakley as the destination of the shipments in question. Oakley was the unloading point for us. We could distribute from Oakley to Hyde Park or anywhere in Oakley or Pleasant Ridge or any place where we made our sales. We had teams and we hauled quite a lot of lumber from Oakley to various jobs which we had, whether they were in Pleasant Ridge or Hyde Park or Oakley; and in addition we had the benefit of saving freight by shipping the lumber to Oakley, and if we did not need it there, then re-billing it. We took that into consideration in shipping to Oakley as destination. We had business all over that part of the city of Cincinnati and delivered lumber from Oakley to jobs wherever they were. The three points, Madisonville, Oakley and Hyde Park are all within the corporate limits of Cincinnati in the northeastern part of the city.

Upon cross examination the witness testified as follows:

I testified before the Public Utilities Commission of Ohio in the hearing had before that Commission on the complaint of W. H. Settle & Company against The Baltimore & Ohio Southwestern Railroad Company, on February 25, 1915. At that time Mr. Barton, now deceased, cross examined me.

And thereupon the witness was asked the following questions and to which he gave the answers hereinafter set out:

"Q. I will ask you if he asked you this question: 'Q. So that the through rate on this interstate movement from southern points to Madisonville was three and a half cents higher than the through rate to Oakley?' And if you didn't answer that question 'Yes, sir.'

A. That the through rate was higher? Yes, sir.

Q. And I will ask you whether he didn't ask you this further question: 'And by having the car billed to Oakley at the rate to Oakley, and having it put on a side track there, and then rebilled from Oakley to Madisonvile, you got it through at a rate somewhat less than twenty-four and a half cents?' Did he ask you that question?

A. If it is in the record there I did.

Q. And didn't you answer to that question 'Yes, sir?'

A. If it is there I did. It is a long time to remember.

Q. And I will ask you whether Mr. Barton didn't ask you this further question: 'And you had that done for the purpose of securing that lower rate?'

A. Whatever cars went to Madisonville we did, yes, sir.

Q. I am not asking you what the fact was; I am asking you whether Mr. Barton asked you that question?

A. I am telling you as I understand that he asked the question and the way I answered it.

Q. And didn't you answer it with the word 'Certainly?'

A. I couldn't say.''

Q. Well, isn't that a fact, Mr. Clephane, without respect to Mr. Barton's questions, isn't that a fact that you did that for the purpose of getting that lower rate?

A. The cars that went to Madisonville they were shipped—the cars that we did ultimately get to Madisonville were shipped to Oakley and reshipped from Oakley to Madisonville for the purpose of getting the lower rate. Is that what you were trying to get?''

And thereupon the defendants further to maintain the issue on their part called as a witness

W. H. Settle,

who being duly sworn testified as follows:

My name in full is W. H. Settle. I am a member of the firm of Settle & Company and I am one of the defendants in this action. We had business and customers at Norwood and at Oakley and vicinity in the lumber business. We had a double advantage by shipping lumber to Oakley, one advantage being that it would be cheaper for us to unload the lumber there by teams than to have it shipped to Madisonville and have it hauled back to Oakley or some other place near there by team.

And we had another advantage in that if we shipped lumber to Oakley and then re-shipped it to Madisonville we saved money on the rate. I consulted the general freight agent, Mr. Sam McLaughlin.

And the defendants further to maintain the issue on their part called as a witness

George Hoadly,

who being first duly sworn testified as follows:

I was attorney for plaintiff in the case of The Baltimore & Ohio Southwestern Railroad Company, plaintiff, against W. H. Settle and George W. Clephane, No. 2498 in the District Court of the United States for the Western Division of the Southern District of Ohio. The paper now shown me is the second amendment to the petition in that case, and is the second amendment to the petition which was passed upon by the Circuit Court of Appeals in that case.

And thereupon defendants offered in evidence the said second amendment to the petition, a copy whereof is hereunto attached, marked Defendants' Exhibit A and made part hereof.

And the foregoing, together with the exhibits hereunto attached and made part hereof, was all the evidence given at the trial of this case.

And thereupon said cause was argued by counsel for plaintiff and defendants respectively, and after said argument the court charged the jury as follows:

CHARGE TO THE JURY.

The Court: Gentlemen of the jury, in this case the Baltimore & Ohio Southwestern Railroad Company sues W. H. Settle and George W. Clephane, partners under the firm name and style of W. H. Settle & Co., for the difference between the published through tariff upon certain shipments which the plaintiff claims were through shipments to Madisonville, Ohio, and the amount of the rate to Cincinnati or Oakley plus the local rate from Oakley to Madisonville, plus whatever incidental charges, such as demurrage or team trackage, that were paid by the defendants upon the shipments set forth in the petition but from which a large number have been voluntarily eliminated by the plaintiff, the list of shipments now in ques-

tion being shown by the documents offered in evidence by the plaintiff.

The plaintiff says in its petition that at the various times mentioned in the petition there were in force, duly filed with the Interstate Commerce Commission and published as required by law, freight tariffs fixing the rates of freight between the points of origin of the several shipments, and the city of Cincinnati in the State of Ohio; and that at said times there were likewise in force freight tariffs duly filed with said Interstate Commerce Commission and published as required by law, between the points of origin of said several shipments and the station of Madisonville in the State of Ohio; that by the rules and regulations of this plaintiff and other carriers, applicable to all shipments from the point of origin of each of the said several shipments, and which rules and regulations were duly filed with the Interstate Commerce Commission and published as required by law, it was provided that all shipments consigned to Oakley, Ohio, should be shipped to and delivered at said Oakley at the rates applicable to shipments to Cincinnati, Ohio. In other words, to put it briefly, that Oakley shipments took the Cincinnati rate. That at the time each of the several shipments mentioned in the account was made and at the time each of the said shipments reached its destination, there were in force, duly filed with the Railroad Commission or the Public Service Commission of the State of Ohio, and published as required by the laws of the state of Ohio, local rates upon shipments, of the class mentioned, from Oakley, Ohio, to Madisonville, Ohio, which said rates were in full force and effect as to shipments originating at said Oakley and destined to said Madisonville, being shipments within the State of Ohio.

Now, all of that is admitted by the defendant in this case. There is no question but what there were the interstate tariffs in force as specified, and that the Oakley shipments took the Cincinnati rate as specified, and that there were in force local tariffs from Oakley to Madisonville. The rest of the plaintiff's petition is denied by the defendant.

Plaintiff goes on and says—and all of the remainder of this petition, as I say, is denied by the defendant—"but said rates had not been filed"—that is, the local rates—"with the Interstate Commerce Commission, nor had they

been published as required by the Act to Regulate Commerce, and the same were not in force nor valid rates with respect to any shipments among the several states of the United States.

"Plaintiff says that at various times during the years 1913 and the succeeding years, certain shipments were made, some of which shipments were consigned to defendants at Oakley, Ohio, by the order and direction of said shippers, and for which bills of lading or other contracts of shipments were issued at the points of origin of said shipments, and which bills of lading or other contracts showed the defendants as the consignees thereof and Oakley, Ohio, as the destination thereof; and certain other shipments were also made from various points to Cincinnati, Ohio, or other points north of the Ohio river, and in which shipments the shippers, certain lumber brokers or other parties, are shown as the consignees thereof, which said shipments were purchased by the defendants in transit and before the same reached Cincinnati, Ohio, and that the defendants ordered the lines bringing the cars containing such shipments into Cincinnati to have the same delivered to the defendants at Oakley, Ohio. Plaintiff says that a complete list of said shipments * * * is attached."

Now, with the exception of the complete list of those shipments being attached, the remainder of that paragraph which I have just read you is also admitted by the defendants, that is to say, that in the year 1913 certain shipments were made, some consigned to Oakley by order of the shippers, etc., others to brokers and various other persons, and reconsigned in transit to the defendants. That is admitted by the defendants. The defendant also admits, and the plaintiff says, that the defendants also paid to the various southern lines hauling the cars mentioned in said statement to Cincinnati the full interstate rate on all of such cars, and then ordered said cars to be delivered to these defendants at Oakley, Ohio, these defendants being entitled to have the same delivered at Oakley, Ohio, at the same rates as Cincinnati. That is also admitted.

Now we come to the part that is denied: "Plaintiff further says that none of said shipments on arriaval at Oakley, Ohio, was received by the defendants, but that immediately upon the arrival of each of said shipments at Oakley, Ohio, the same were placed upon team tracks

of this plaintiff at said Oakley, Ohio, and the defendants thereupon immediately notified of the arrival thereof; and that immediately thereafter, in each case, defendants directed the same to be forwarded to Madisonville, Ohio, under a new bill of lading or contract of shipment. Plaintiff further says that in some cases new bills of lading were made out by the defendants for such shipments from Oakley, Ohio, to Madisonville, Ohio, and the same were signed by the agent of this plaintiff at Oakley; and in certain other cases no bills of lading or contracts of shipments were signed." That is denied by the defendants. "Plaintiff further says that defendants did not, at any time during the movement of said shipments or before shipment or after their arrival at Oakley, intend to receive or unload any of said shipments at Oakley; but that defendants at all of said times intended to receive and unload said shipments at Madisonville, aforesaid." That is denied by the defendants. "That defendants had at Oakley no yards, mills or other facilities for the receipt of freight, and that their yards and other facilities for unloading and receiving shipments of lumber were situated at Madisonville and not elsewhere." That is denied by the defendants. "Plaintiff further says that said shipments were so made to said Oakley, Ohio, and were reconsigned to said Madisonville, Ohio, as hereinbefore described, for the purpose of securing by the combination of the rates to Cincinnati, Ohio, and from Oakley, Ohio to Madisonville, Ohio, as aforesaid, lower rates than the through rates from the points of origin of said shipments to Madisonville filed with the Interstate Commerce Commission." That is denied by the answer of the defendants. "Plaintiff further says that the rates charged upon each of said shipments and paid by the defendants consisted of the rates from the point of origin to Cincinnati, Ohio, the same being applicable to Oakley, Ohio, as hereinbefore set out, together with the rate published and filed with the Public Service Commission of Ohio from said Oakley to Madisonville, which said rate was less than the true rate properly applicable to each of said shipments and which ought to have been charged for the transportation thereof; whereas the plaintiff says that the true rate properly applicable to each of said shipments was the rate named and published as being the through rate from the point of origin of each of said shipments to Madisonville, Ohio, in the traiffs hereinbefore mentioned.

That the date of each of said shipments; the weight thereof; the number and initials of the car in which the same was transported; the amount paid for the transportation thereof; the amount which should have been paid for the transportation thereof, and the difference between said amounts, are shown in detail in the account hereto attached, marked 'Exhibit A' and made part hereof." All of which is denied by the defendants. "Plaintiff says that by reason of the foregoing the defendants are indebted to plaintiff in the sum of $1,339.88," which has now been voluntarily reduced by the plaintiff to the sum of $528.10, with interest from the 21st day of January, 1915, to the first day of this term, to-wit, the 6th day of April, 1920.

Now, to that the defendants have filed their answer, and I will not repeat their denials because I have indicated so much of it as was denied as I went along. Further answering, the defendants deny "that none of said shipments on arrival at Oakley, Ohio, was received by the defendants" but aver that all of said shipments on arrival at Oakley, Ohio, were received by these defendants. Further answering, they say that upon the arrival of each of said shipments at Oakley the same were placed on the team tracks of the plaintiff at Oakley. That in some instances the lumber was removed from said cars at Oakley, Ohio, and in other instances, the defendants directed the same to be forwarded to Madisonville, Ohio, under a new bill of lading or contract of shipment. Defendants further say that on all of said shipments, the plaintiff made a trackage charge of two dollars a car on each of said cars for making the delivery on the public team tracks at Oakley, Ohio, which charge was collected by said plaintiff, and that upon all of said cars, which were not reconsigned from Oakley, Ohio, to Madisonville, Ohio, as aforesaid, within twenty-four hours (the same being the free time allowed for reconsignment of car load freight) said plaintiff charged said defendants demurrage or car service, at the rate of one dollar per day, on the cars so detained beyond the said free time limit, and that the same was paid by these defendants, and that said plaintiff likewise charged demurrage on all of said cars at Madisonville, after the free time allowed for unloading the same, to-wit, forty-eight hours, which charges these defendants paid.

Further answering, defendants deny that in some cases no bills of lading were made out for such shipments from Oakley, Ohio, to Madisonville, Ohio, and that the same

were signed by the plaintiff's agent at Oakley, and that in other cases no bills of lading or contracts of shipment were signed.

Defendants further deny that they at any time during the movement of said shipments, or before shipment, or after their arrival at Oakley, Ohio, did not intend to receive or unload any of said shipments at Oakley.

They also have an averment with regard to an Interstate Commerce rule, which I deem not material to the issues submitted to you and which I do not therefore read. And they deny each and every allegation of the plaintiff's petition which they have not specifically admitted. I have indicated their admissions when I read you the petition.

Now, gentlemen of the jury, the real gist of this case is whether these were nothing more than through shipments from the point of origin to Madisonville, Ohio, or whether they were in fact shipments to Oakley, with an actual good-faith delivery to the defendants at Oakley, and reconsignments actually by the defendants, having received possession of the lumber at Oakley, to Madisonville.

The law requires those railroads engaged in interstate commerce to file their tariffs or charges for interstate commerce with the United States Interstate Commerce Commission, and the purpose of that is that there shall be one freight rate in interstate commerce, the same for everyboy; and nobody has authority to depart from it. There is no authority to depart from it by contract between the shipper and the railroad; there is no authority to depart from it by contract between the consignee and the railroad, the purpose of it being that everybody shall have, and be charged, and enjoy, and be served at, the same rate of freight for shipment from the point of origin to the point of destination. And if private agreements varying that were allowed between the consignee and the railroad company, or the shipper and the railroad company, the purpose of the law would, of course, be defeated. And so it makes no difference what private agreement or understanding, whether in good faith or in bad faith, there may have been; the question simply is, was this an interstate shipment all the way to Madisonville from point of origin? (These shipments originated outside of the state of Ohio.) If it was, the defendants are obliged to pay the rate, and if they paid less than the rate, plaintiffs, upon showing that it was in fact a through shipment all the way to Madisonville, if they have shown that by a

preponderance of the evidence they would be entitled to a verdict against the defendants for the difference between the published through rate or tariff to Madisonville from points of origin and the amount actually paid, including all incidental charges, such as demurrage and team trackage, for which the defendants would be entitled to receive credit. But unless the plaintiff has, by a preponderance of all the evidence in this case, shown that these were actually through shipments all the way to Madisonville, and not shipments to Cincinnati or Oakley, there received in good faith and reconsigned to Madisonville, then and under those circumstances your verdict would be for the defendants.

Now, the burden of proof is upon the plaintiff to show by a preponderance of all the evidence in this case that these shipments were through shipments from points of origin to Madisonville, Ohio. If there was an actual good-faith delivery of these shipments to the defendants, Settle and Clephane, at Oakley, Ohio, and actually a new and independent shipment by the defendants to Madisonville, while the lumber was physically there and in the defendant's possession, then and under those circumstances there was no through shipment to Madisonville and the through rate did not apply. But if, on the other hand, there was no actual good-faith delivery of these shipments to the defendants, Settle and Clephane, at Oakley, and no actual new and independent shipment by the said defendants to Madisonville while the lumber was physically present and in their possession, then there was a through shipment. That is to say, if the lumber did not actually come, in good faith, into the possession, delivered in good faith into the possession of the defendants at Oakley, then and under those circumstances it was merely a through shipment to Madisonville.

Now, that gets it down to this point: What is an actual good-faith delivery of this lumber, of these shipments of lumber at Oakley? What constitutes an actual good-faith delivery? Now, I charge you that as a matter of law, the existence of an original and continuing intention in the minds of the defendants, Settle and Clephane to reship this lumber from Oakley to Madisonville, for the purpose of saving expense, is not, of itself, sufficient to convert the shipments into through shipments if there was otherwise a good-faith delivery at Oakley. In other words, what I mean is this: If there was a good-faith

delivery of this lumber at Oakley, to Settle and Clephane, the fact that they always had an intention in their mind, and persevered in that intention, of reshipping it to Madisonville for the purpose of saving money on freight, that would not necessarily constitute a through shipment in interstate commerce. Therefore, what, then, is a good-faith delivery to them at Oakley and an actual new and independent reshipment to Madisonville?

In determining that question you may consider what was done with the cars, physically. You may take into consideration whether or not they were cut off from the other trains at Oakley. You may consider whether they were put upon different tracks than the tracks going through, ordinarily used for through shipments, or tracks known as team tracks, for the purpose of unloading. You may take into consideration any demurrage charges that the defendants may have had to pay for these cars while detained at Oakley. You may take into consideration any team trackage charges that were imposed by reason of the detention of these cars at Oakley. You may take into consideration the fact, if it be a fact, that some at times were, and others were not, unloaded at Oakley. If the car reached Oakley, and they were notified of its arrival, and held the bill of lading entitling them to possession of the car, and did, by orders, put it upon a team track, or otherwise exercise dominion or the rights of ownership over that car, those facts would be evidences of delivery to them.

And so you will take all of the evidence in this case into consideration, and if you find there was an actual good-faith delivery of these cars to the defendants at Oakley, Ohio, and a new and independent re-shipping of them, or reconsigning them, to Madisonville, Ohio, your verdict will be for the defendant. But if, on the other hand, you find that there was no actual good-faith delivery to them at Oakley, and no actual new and independent re-shipment to Madisonville, and the whole thing was in fact a through shipment in interstate commerce to Madisonville, Ohio, you will then find a verdict for the plaintiff. And if you find for the plaintiff you will assess its damages at the difference between the through freight rates from point of origin to Madisonville, as published by the Interstate Commerce Commission, and the amounts actually paid, including the incidental charges of demurrage and team trackage. And you will find this verdict on whatever, whether one or more of these shipments that

you find to have been through shipments in interstate commerce to Madisonville, if you should find any difference among them. If you should find them all to be through shipments to Madisonville, then you would allow that measure of damages as to all. To whatever sum you shall find, if you shall find for the plaintiff, you will add interest from the date set forth in the petition to the 6th day of April, 1920, at the rate of six per cent. per annum, simple interest.

Now, gentlemen of the jury, it is your province to pass upon the facts and the evidence. That is entirely within your province. The law it is your duty to take from the court as I state it to you in this charge, and, applying the law as the court gives it to you, to your conclusions as to the facts, you will reach your verdict in this case.

The credibility of the witnesses is a matter that is solely within your province. You may, in determining the credibility of the witnesses, consider their interest, if any, in the outcome of this case; any bias or prejudice that they may have exhibited upon the witness stand while testifying; their manner upon the witness stand; and any other and all facts which tend to affect their credibility, that is, the believeability of their evidence. And, having given consideration to all those facts and circumstances, you are entitled to give to the testimony of each and every witness such credit as you think it is entitled to receive. And thus you may conclude to receive part of the testimony of a witness and reject part. You may receive all a witness has said as credible, or you may reject all that a witness has said as incredible if you find him to be unworthy of belief. But you should not arbitrarily and without cause reject all or part of the testimony of any witness; you should always be able to give yourself good reason for rejecting all or any part of the testimony of a witness.

And thus, having considered the case, you will arrive at your verdict, without prejudice to either party one way or the other, calmly and dispassionately, remembering that this court is here, and you are here, for the purpose of administering justice among men, without respect to the parties, simply as determined by the law and the evidence.

You may now retire to your jury room, select your foreman, and deliberate upon your verdict, and when you have concluded your deliberations, report to the court.

And thereupon the plaintiff, in open court and before the withdrawal of the jury, excepted to that portion of the charge of the court in which the court said that the existing and continuous intent on the part of the defendants to reship the lumber from Oakley to Madisonville was not in and of itself sufficient to make it an interstate shipment; and at the same time requested the court to charge that such an existing and continuous intent to reship lumber from Oakley to Madisonville did make the shipment an interstate shipment.

Whereupon the court further charged the jury as follows:—

"I would further charge this, that the existence of such an intention to reship, an original and continuing intention to reship from Oakley to Madisonville is not necessarily and of itself conclusive evidence of an interstate shipment, but, of course, such intention may be taken into consideration in connection with the other facts and circumstances of the case."

To which further instruction to the jury the plaintiff then and there excepted.

Whereupon the plaintiff, before the withdrawal of the jury, further excepted to that portion of the charge of the court in which the court told the jury that they might consider the collection of demurrage on these cars at Oakley or of team track charges as evidence of delivery at Oakley.

And thereupon the jury retired, and after deliberation rendered a verdict for defendants, as appears of rcord herein.

And thereupon the plaintiff filed its motion for a new trial at the same term of court. as likewise appears of record herein.

Whereupon the plaintiff tenders this its bill of exceptions, which having been examined by the court is now allowed, signed, sealed, and ordered to be made part of the record in the above entitled cause.

Peck, Judge.

Correct: W. W. Clippinger, Attorney for defendants.
September 14, 1920.

DEFENDANT'S EXHIBIT A.

Second Amendment to Petition.

(Filed September 14, 1920.)

Now comes the plaintiff, and by way of a second amendment to its petition, not withdrawing any of the allegations in its original petitions set forth but in lieu and stead of the allegations contained in the amendment to its petition, heretofore filed herein, says: that at the time of the several shipments mentioned in the petition, there were in force, duly filed with the Interstate Commerce Commission and published as required by law, freight tariffs fixing the rates of freight upon shipments of the character mentioned in the petition, between the points of origin of the several shipments mentioned in the petition and the city of Cincinnati in the state of Ohio, and that there were likewise at all of said times in force freight tariffs duly filed with the Interstate Commerce Commission and published as required by law, between the points of origin of said shipments mentioned in the petition and the village of Madisonville in the state of Ohio. That by the rules and regulations of this plaintiff and other carriers, applicable to all shipments from the point of origin of each of the said several shipments, and which rules and regulations were duly filed with the Interstate Commerce Commission and published as required by law, it was provided that shipments to Oakley, Ohio, should be shipped to and delivered at said Oakley at the rates applicable to shipments to Cincinnati, Ohio.

Plaintiff further says that at each of the said times there were in force, duly filed with the Railroad Commission or the Public Service Commission of the state of Ohio, and published as required by the laws of the state of Ohio, local rates upon shipments, of the class mentioned, from Oakley, Ohio, to Madisonville, Ohio, and that said rates were in full force and effect as to shipments between points in the state of Ohio, but that the same had not been filed with the Interstate Commerce Commission nor published as required by the act to regulate commerce.

Plaintiff further says that each of the said shipments mentioned in the petition was consigned to the defendants at Oakley, Ohio, by the direction and orders of said defendants, and that the bills of lading or other contracts

of shipments issued at the points of origin of said shipments showed the defendants as the consignees, and Oakley, Ohio, as the destination thereof on some of the shipments, while the bills of lading or other contracts of shipments issued at the points of origin on other of the shipments showed the shippers, certain lumber brokers, or other parties as the consignees and Cincinnati, Ohio, or other points north of the Ohio river as the destinations thereof; and that the shipments that were not consigned direct to the defendants at Oakley, Ohio, from the points of origin of said shipments were purchased by the defendants while they were in transit and before they reached Cincinnati, Ohio, and that on such of said shipments the defendants ordered the southern lines bringing the cars into Cincinnati to have them delivered to the defedants at Oakley, Ohio.

Plaintiff further says that the defendants paid to the Southern lines hauling the cars into Cincinnati the full interstate rates on all of such cars and then ordered the cars delivered to the defendants at Oakley, Ohio, inasmuch as Oakley, Ohio, is accorded the same rate as Cincinnati proper.

Plaintiff further says that it was the intention of the defendants that all of said shipments, regardless of how consigned, should be received by the defendants at Madisonville, Ohio.

Plaintiff further says that the said shipments were, and each of them was, billed to this plaintiff by its southern connections as being consigned to the defendants at Oakley, Ohio.

Plaintiff further says that each of said shipments upon its arrival at Oakley, Ohio, was received by the defendants, although the lumber was not removed from the cars, and that subsequently the shipments were, by the direction of the defendants, moved to Madisonville, Ohio, under a new bill of lading or contract of shipment, and that said shipments were so made to said Oakley, Ohio, and reconsigned to defendants at Madisonville, Ohio, for the purpose of securing by the combination of the rates to Cincinnati and from Oakley to Madisonville aforesaid, lower rates than the through rates from the points of origin of said shipments to Madisonville, filed with the Interstate Commerce Commission.

Plaintiff further says that on all of said shipments the plaintiff made a trackage charge of $2.00 a car on each of

said cars for making the delivery on the public team track at Oakley, Ohio; that as to a large part of said shipments said charge was paid by the connecting lines delivering said freight to this plaintiff at Cincinnati, out of their proportion of the through rate; and that as to some, the same was charged to and paid by the defendants, but that all such charges had been credited to the said defendants in the account attached to the original petition herein, and that the amount sued for is due from the defendants after crediting them with all such payments made by them; and that upon all of said cars which were not reconsigned from said Oakley to Madisonville aforesaid within twenty-four hours (the same being the free time allowed for the reconsignment of carload freight), this plaintiff charged the defendant demurrage or car service at the rate of $1.00 per day on the cars so detained beyond the said free time limit, and that this defendant likewise charged demurrage on all of said cars at Madisonville after the free time allowed for unloading the same, to-wit, forty-eight hours.

Plaintiff further says that the rates charged upon each of said shipments and paid by the defendants consisted of the rate from the point of origin to Cincinnati, Ohio, the same being applicable to Oakley, Ohio, as hereinbefore set out, together with the rate published and filed with the Public Service Commission of Ohio, from said Oakley to Madisonville, and that the defendants, in addition thereto, were charged the demurrage charges hereinbefore mentioned, the same, however, not being a charge for the transportation of said freight. And the plaintiff says that the true rate properly applicable to each of said shipments, and which ought to have been charged for the transportation thereof, was the rate named and published as being the rate from the point of origin of each of said shipments to Madisonville, Ohio, in the tariffs hereinbefore mentioned, and being the amount named in the account attached to the petition, marked Exhibit A and made part hereof, as being the amount which should have been charged on each of said shipments; and that by reason thereof the defendants are indebted to plaintiff as set out in the original petition herein.

Harmon, Colston, Goldsmith & Hoadly.
Attorneys for the Plaintiff.

State of Ohio, Hamilton County, ss:

George Hoadly, being first duly sworn, says that he is

one of the attorneys for the plaintiff in the above entitled action; that plaintiff is a corporation, and that the statements of the foregoing second amendment to petition are true as he verily believes.

Geo. Hoadly.

Sworn to before me and subscribed in my presence, this 31st day of December, 1915.

Eugene Brunsman,
Notary Public, Hamilton County, Ohio.

PETITION FOR THE ALLOWANCE OF A WRIT OF ERROR.

(Filed September 14, 1920.)

The Baltimore & Ohio Southwestern Railroad Company, the plaintiff herein, comes now and says that on or about the 11th day of May, A. D. 1920, the District Court of the United States for the Western Division and Southern District of Ohio, entered a judgment herein in favor of the defendants and against this plaintiff, in which judgment and proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff; all of which will more fully appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Sixth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Sixth Circuit.

Harmon, Colston, Goldsmith & Hoadly,
Attorneys for Plaintiff.

ASSIGNMENT OF ERRORS.

(Filed September 14, 1920.)

The plaintiff in this action, in connection with its petition for a writ of error, makes the followng assignment of errors which it avers occurred upon the trial of this cause, to-wit:

1. The court erred in overruling the objection of the plaintiff to the following question asked by the defendants of the witness, Pearl M. Grate:

"I asked you, Mr. Grate, if it is not true that during the time you were agent at Oakley that the defendants Mr. Clephane and Mr. Settle received a number of cars there and unloaded them there."

To which action of the court in overruling said objection the plaintiff then and there excepted.

And the witness was thereupon permitted to answer said question.

2. The court erred in its charge to the jury in the following respect:

"Now I charge you that as a matter of law, the existence of an original and continuing intention in the minds of the defendants Settle and Clephane to reship this lumber from Oakley to Madisonville for the purpose of saving expense, is not, of itself, sufficient to convert the shipments into through shipments if there was otherwise a good faith delivery at Oakley. In other words, what I mean is this: If there was a good faith delivery of this lumber at Oakley, to Settle and Clephane, the fact that they always had an intention in their mind and persevered in that intention, of reshipping it to Madisonville for the purpose of saving money on freight, that would not necessarily constitute a through shipment in interstate commerce."

To which portion of the charge of the court the defendant thereupon and after the delivery of said charge and before the withdrawal of the jury then and there excepted.

3. The court erred in that the court, in response to the request of the defendants to instruct the jury that an existing and continuous intent to reship the lumber from Oakley to Madisonville did make the shipment an interstate shipment, instructed the jury as follows:

"I would further charge this, that the existence of such

intention to reship, an original and continuing intention to reship from Oakley to Madisonvlle is not necessarily conclusive evidence of an interstate shipment, but of course such intention may be taken into consideration in connection with the other facts and circumstances of the case."

To which further instruction to the jury the plaintiff then and there in open court and before the withdrawal of the jury excepted.

4. The court further erred in instructing the jury, with reference to the determination by them whether there was in fact a good faith delivery to the defendants at Oakley, as follows:

"You may take into consideration any demurrage charges that the defendants may have had to pay for these cars while detained at Oakley. You may take into consideration any team trackage charges that were imposed by reason of the detention of these cars at Oakley."

To which instruction by the court the plaintiff then and there and in open court and before the withdrawal of the jury excepted.

5. The court erred in entering judgment in favor of defendants and against the plaintiff.

Wherefore plaintiff prays that the judgment of the said District Court may be reversed and that it may be restored to all things it has lost by reason thereof.

Harmon, Colston, Goldsmith & Hoadly,
Attorneys for Plaintiff.

ORDER ALLOWING A WRIT OF ERROR.

(Filed September 14, 1920.)

This 14th day of September, 1920, came the plaintiff by its attorneys and filed herein and presented to the court its petition praying for the allowance of a writ of error and assignment of errors intended to be urged by it; praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Judicial Circuit; and that such other and further proceedings be had as may be proper in the premises.

Upon consideration whereof the court doth allow a writ of error upon the plaintiff giving bond according to law in the sum of five hundred dollars.

Peck, Judge.

WRIT OF ERROR.

(Filed September 14, 1920.)

To the Honorable, the Judge of the District Court of the United States for the Southern District of Ohio.

Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between The Baltimore & Ohio Southwestern Railroad Company, plaintiff, and W. H. Settle and George W. Clephane, partners under the firm name and style of W. H. Settle & Co., defendants, a manifest error hath happened, to the great

damage of the said The Baltimore & Ohio Southwestern Railroad Company, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said Circuit, on the 14th day of October next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the 14th day of September, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States of America the one hundred and forty-fifth.

(seal) B. E. Dilley,
Clerk of the District Court of the United States, Southern District of Ohio.

Allowed by Peck, Judge.

BOND ON APPEAL.

(Filed September 14, 1920.)

Know all men by these presents, That we, The Baltimore & Ohio Southwestern Railroad Company, as principal, and American Surety Company of New York, as sure-

ty, are held and firmly bound unto W. H. Settle and George W. Clephane, partners under the firm name and style of W. H. Settle & Co., in the full and just sum of Five Hundred (500) Dollars, to be paid to the said W. H. Settle and George W. Clephane, partners under the firm name and style of W. H. Settle & Co., certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this —— day of July, in the year of our Lord one thousand nine hundred and twenty.

Whereas, lately at a District Court of the United States for the Southern District of Ohio, Western Division, in a suit depending in said court, between The Baltimore & Ohio Southwestern Railroad Company, plaintiff, and W. H. Settle and George W. Clephane, partners under the firm name and style of W. H. Settle & Co., defendants, a judgment was rendered against the said The Baltimore & Ohio Southwestern Railroad Company, and the said The Baltimore & Ohio Southwestern Railroad Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said W. H. Settle and George W. Clephane, partners under the firm name and style of W. H. Settle & Co., citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said circuit, on the thirty-first day of July, next.

Now, the condition of the above obligation is such, That if the said The Baltimore & Ohio Southwestern Railroad Company shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of

The Baltimore & Ohio Southwestern Railroad Co.,
By George Hoadly, its Attorney.

American Surety Company of New York,
By Howard Ecker, Resident Vice President.

Attest: F. T. McErlane, Resident Asst. Secretary.

Approved by Peck, Judge.

CITATION.

(Filed September 18, 1920.)

To W. H. Settle and George W. Clephane, partners under the firm name and style of W. H. Settle & Co., Greeting

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit, on the 14th day of September, next, pursuant to a Writ of Error, filed in the Clerk's Office of the District Court of the United States for the Southern District of Ohio, wherein The Baltimore & Ohio Southwestern Railroad Company is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 14th day of September, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States of America the one hundred and forty-fourth.

Peck, Judge.

Received copy of the within.

W. W. Clippinger,
Attorney for Defendants.

September 18, 1920.

ORDER EXTENDING TIME FOR FILING PRINTED RECORD.

(Filed September 14, 1920.)

Upon application of plaintiff and for good cause shown to the Court, it is ordered that the time for filing in the Circuit Court of Appeals the printed record in the above cause be and the same hereby is extended to November 15, 1920.

Peck, Judge.

PRAECIPE FOR RECORD.

(Filed September 18, 1920.)

In making up the record in the above case on error, please include the following papers only:

1. Petition.
2. Amended answer.
3. Verdict.
4. Motion for a new trial.
5. Order overruling motion for a new trial and entering judgment for defendant.
6. Bill of exceptions.
7. Petition for allowance of writ of error.
8. Assignment of errors.
9. Order allowing writ of error.
10. Writ of error.
11. Bond.
12. Citation.
13. Order extending time for filing printed record.

Harmon, Colston, Goldsmith & Hoadly,
Attorneys for Plaintiff.

CLERK'S CERTIFICATE.

I, B. E. Dilley, Clerk of the District Court of the United States for the District and Division aforesaid, do hereby certify that the foregoing pages numbered from 1 to 42, inclusive contain a true and correct copy of those portions of the record and proceedings indicated in the praecipe for record filed September 18, 1920, found on page 41 hereof, as the same appear of record and on file in the office of the Clerk of said court in the above entitled cause.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of said court, at the City of Cincinnati, this 10th day of November, 1920.

B. E. Dilley, Clerk,
By Harry Rabe, Deputy,

5,000-11-18-14.

CO

THE CENT

STUART A. ALLEN, Manager,
CINCINNATI, OHIO.

Below please find Statement of Freigh

DATE	Car Number and Initial	Original Loading Station	ROAD Way bill
6/12/13	L.S 46956	Lome, Ala	343
"	A.L.E 230	Exa, Ala	"
7/2/13	SL SF 126345	Tellico Plains Tenn	32
7/7/13	GT. STE 41546	Ida Ala	130
7/7/13	Sou 134845	Billingsley Ala	"
7/15/13	L.N 12856	Ida Ala	356
7/16/13	CB&Q 102529	Autaugaville Ala	390
7/19/13	S.L.Z 29248	Hawkes Miss	532
7/21/13	NYC 27013	Sanford Ala	552
"	PRR 82951	Tellico Plains Tenn	"
7/28/13	L.N 2237	" " "	790
7/31/13	L.N 90981	Brewton Ala	881
"	P Co 13505	Zachary La	"
8/5/13	CV 117172	Eros La	114
8/20/13	M.K.T 70232	Brewton Ala	634
8/27/13	C.O 3231	Nadawah Ala	691
9/15/13	C M St P 200354	Ethelsville Ala	460
9/5/13	NYC 60874	Laurel Miss	459
9/19/13	C&NW 25574	" "	629
9/19/13	W.O.N.E 15605	" "	631
9/19/13	CP 148476	Chatsworth Ga	630
9/24/13	ACL 39019	Spring Hill La	798
9/25/13	C&O 12948	Picayune Miss	840
10/1/13	Sa L 20096	Chattanooga Tenn	7
10/3/13	S.L.F 1830	[illegible]	[illegible]

17-23-21

Form 170.

CONTINENTAL LINE
ENTRAL STATES DISPATCH.

OFFICE OF AGENT.

r, ____________________ 191__

reight from this Territory for Week Ending ____________________ 191__

OAD bill	Via Line Billing Junction Weight	ARTICLES Total Frt Chgs Paid	WEIGHT Should be		CONSIGNEE Thru rate and Tarrif Authority	DESTINATION	Undercharge
43	43400	94.48	97	65	22½ Huron ICC A 44		3.17
"	41200	82.40	92	70	22½ M.O ICC A 844		10.30
32	38900	70.24	71	97	15 L.N ICC A 12740 / 2½ Morris ICC 281	Cents Beyond	1.73
30	39800	100.66	110	61	22½ M.O ICC A 844		9.95
"	50800	101.60	114	30	" " "		12.70
56	34000	76.00	76	50	19 L.N ICC A 12749 / 2½ Morris ICC 281	Cents Beyond	.50
40	47300	104.06	115	89	24½ M.O ICC A 844		11.83
32	40500	89.10	99	23	24½ N.O, T.L ICC 2620		10.13
52	38600	92.92	94	57	21 L.N ICC A 11472 / 2½ Morris ICC 281	Cents Beyond	1.65
"	40200	72.32	74	37	15 L.N ICC A 12740 / 3½ Morris ICC 281	Cents Beyond	2.05
00	44300	78.88	81	96	" " "		3.08
81	47900	113.38	117	36	21 L.N ICC A 12749 / 3½ Morris ICC 281	Cents Beyond	3.98
"	34000	74.80	83	30	2 G.O ICC 2006 / 3½ Morris ICC 281	Cents Beyond	8.50
14	42500	101.99	107	31	25¼ Z.S.P ICC 2679		5.32
34	50600	119.38	123	97	21 L.N ICC A 12749 / 3½ Morris ICC 281	Cents Beyond	4.59
91	34000	82.80	83	30	21 L.N ICC A 12749 / 3½ Morris ICC 281	Cents Beyond	.50
60	43200	86.40	97	20	22½ M.O ICC A 844		10.80
59	40600	89.32	99	47	21 M.O.T.L ICC 2709 / 3½ Morris ICC 281	Cents Beyond	10.15
29	50000	110.00	122	50	" " "		12.50
31	42300	93.06	103	64	" " "		10.58
30	37200	67.52	68	82	15 L.N ICC A 12740 / 3½ Morris ICC 281	Cents Beyond	1.30
94	44300	106.[illegible]	111	86	25¼ Z.S.P ICC 2679		5.54
40	45800	100.76	112	[illegible]	[illegible] T.E ICC 2630		11.45
					[illegible] ICC A 4192 / 281	Cents Beyond	10.98
7	43900						

Form 170.

10/29/13	G A L	24025	Polanvill Miss	1294	51300				
12/16/13	B & O	86893	Chacahoula La	371	39400	86.68	96	33	[illegible] B Dec 2454
"	Sou	184507	Enondale Miss	"	46800	105.85	117	55	22½ M & O Dec a 844
12/24/13	M P	26031	Stewart Ala	581	35400	70.80	76	11	21½ Hintons Dec a 4[illegible]
12/20/13	PRR	279959	Gordo Ala	637	49600	99.20	111	60	22½ M & O Dec a 844
2/6/14	C P	203521	Laurel Miss	108	31900 / 34000	70.39	78	89	21 N O & N E Dec 2709 / 3½ Morris Dec 281
2/10/14	F R R	532676	Lorne Ala	200	52700	105.40	118	58	22½ Hintons Dec a 40
2/14/14	Gm & StP	28270	Pace Jct Fla	308	44200	105.24	108	29	21 L & N Dec a 12749 / 3½ Morris Dec 281
2/19/14	Frisco	126623	Carrollton Ala	382	41600	83.20	93	60	22½ M & O Dec a 844
"	C & O	1839	Welton Ala	"	54200	108.40	121	95	22½ Hintons Dec a 40
3/5/14	N Y	38597	Nason Miss	75	40400	88.88	98	98	21 N O & N E Dec 2709 / 3½ Morris Dec 281
3/10/14	[illegible]	38665	Bond Miss	191	48000	105.60	117	60	" " "
3/17/14	C B & Q	32229	Electric Mills Miss	360	56200	112.45	126	45	22½ M & O Dec a 844
"	N S	16212	Hawkes Miss	"	36600	80.52	89	67	24½ N O & N E Dec 2630
"	N S	20814	Lacherie La	"	38200	84.04	93	59	21 T P Dec 2006 / 3½ Morris Dec 281
3/14/14	L & N	2697	Tennga Tenn	421	59600	104.32	110	26	15 L & N Dec a 12740 / 3½ Morris Dec 281
"	T P	16347	Lacherie La	"	45100	99.22	110	50	21 T P Dec 2006 / 3½ Morris Dec 281
3/20/14	M & O	13592	Stafford Ala	460	56200	129.26	132	07	22½ M & O Dec a 844
"	C B & Q	110938	Summit Tenn	"	38400	53.76	63	36	13 Southern Dec 5915 / 3½ Morris Dec 281
"	B & O	43636	Lewisburg Tenn	"	49800	134.99	139	44	24½ N C & St L Dec 1770 / 3½ Morris Dec 281
"	M & O	14493	De Soto Miss	"	52500	115.50	128	63	24½ M & O Dec a 844
4/1/14	S F	27853	Zona La	6	43700	96.14	107	07	24½ N O G N Dec 230
4/3/14	N Y	53062	McDonald Tenn	90	66580	93.81	109	85	13 Southern Dec a 5915 / 3½ Morris Dec 281
"	L S	47602	La Fayette Ga	"	56000	89.61	103	60	18½ Hintons Dec a 40
4/17/14	BR & P	4046	Atlanta La	446	43200	95.04	105	84	21 R R & N Dec a 472 / 3½ Morris Dec 281
4/23/14	B & P	25845	Zona La	591	46100	101.42	112	95	24½ N O G N Dec 230
4/20/14	G S S	12815	Bond Miss	492	41300	90.86	101	19	21 N O & N E Dec 2709 / 3½ Morris Dec 281
4/29/14	Erie	109703	Zona La	764	37500	82.50	91	88	24½ N O G N Dec 230
"	N Y	2403	Carrollton Ala	"	50900	101.80	114	53	22½ M & O Dec a 844
5/5/14	M C	87117	Bond Miss	104	47200	103.84	115	64	21 N O & N E Dec 2709 / 3½ Morris Dec 281
5/7/14	OSL	11118	Maplesville Ala	150	50500	101.00	113	63	22½ M & O Dec a 844
"	C & E	4001	"	"	47700	95.34	107	33	" " "
"	StL & SF	18583	"	"	45600	91.20	102	60	" " "
5/11/14	Sou	32627	Corduroy Ala	311	50600	119.38	123	97	21 L & N Dec a 13909 / 3½ Morris Dec 281
5/19/14	C T	104265	Wiggins Miss	490	34000	74.77	83	30	21 N O & N E Dec 2709 / 3½ Morris Dec 281
5/25/14	Frisco	32774	Sanford Tenn	670	36400	50.96	60	06	13 Southern Dec 5915 / 3½ Morris Dec 281

"Exhibit A"

ecatur La	371	39400	86.68		96	33	[illegible]			12.82
ondale Miss	"	46800	105.85		117	55	22½ M.O Dec a 844			9.85
uart Ala	581	35400	70.80		76	11	21½ Hinton Dec a 40			11.70
rdo Ala	637	49600	99.20		111	60	22½ M.O Dec a 844			5.31
urel Miss	108	31900 34200	70.39		78	89	21 20 R & L Dec 2709 3½ Morris Dec 281	Cents Beyond		12.40
nne Ala	200	52700	105.40		118	58	22½ Hinton Dec a 40			8.50
es Jct Fla	308	44200	105.24		103	29	21 2, R & Dec a 12749 3½ Morris Dec 281	Cents Beyond		13.18
allton Ala	382	41600	83.20		93	60	22½ M.O Dec a 844			3.05
lton Ala	"	54200	108.40		121	95	22½ Hinton Dec a 40			10.40
son Miss	75	40400	88.88		98	98	21 20 R & L Dec 2709 3½ Morris Dec 281	Cents Beyond		13.55
nd Miss	191	48000	105.60		117	60	" " "	"		10.10
tric Mills Miss	360	56200	112.45		126	45	22½ M.O Dec a 844			12.60
ukes Miss	"	36600	80.52		89	67	24½ 20 R & L Dec 2630			14.00
herne La	"	38200	84.04		93	59	21 20 R & L Dec 2006 3½ Morris Dec 281	Cents Beyond		9.15
nga Tenn	471	59600	104.32		110	26	15 2, R & Dec a 12760 3½ Morris Dec 281	Cents Beyond		9.55
hene La	"	45100	99.22		110	50	21 20 R & L Dec 2006 3½ Morris Dec 281	Cents Beyond		5.96
fford Ala	460	56200	129.26		132	07	22½ M.O Dec a 844			11.28
mut Tenn	"	38400	53.76		63	36	13 Southern Dec 5915 3½ Morris Dec 281	Cents Beyond		2.81
nsburg Tenn	"	49800	134.99		139	44	24½ 20 R & L Dec 1770 a 3½ Morris Dec 281	Cents Beyond		9.60
Sota Miss	"	52500	115.50		128	63	24½ M.O Dec a 844			4.45
na La	6	43700	96.14		107	07	24½ 20 R & L Dec 230			13.13
Donald Tenn	90	66580	93.21		109	85	13 Southern Dec a 5915 3½ Morris Dec 281	Cents Beyond		10.93
Payette Ga	"	56000	89.61		103	60	18½ Houston Dec a 40			16.64
anta La	446	43200	95.04		105	84	21 20 R & L Dec a 772 3½ Morris Dec 281	Cents Beyond		13.99
na La	591	46100	101.42		112	95	24½ 20 R & L Dec 230			10.80
na Miss	492	41300	90.86		101	19	21 20 R & L Dec 2709 3½ Morris Dec 281	Cents Beyond		11.53
na La	764	37500	82.50		91	88	24½ 20 R & L Dec 230			10.32
allton Ala	"	50900	101.80		114	53	22½ M.O Dec a 844			9.38
nd Miss	104	47200	103.84		115	64	21 20 R & L Dec 2709 3½ Morris Dec 281	Cents Beyond		12.73
nville Ala	180	50500	101.00		113	63	22½ M.O Dec a 844			11.80
"	"	47700	95.34		107	33	" " "			12.63
"	"	45600	91.20		102	60	" " "			11.99
duroy Ala	311	50600	119.38		123	97	21 2, R & Dec a 12903 3½ Morris Dec 281	Cents Beyond		11.40
ggins Miss	490	34000	74.77		83	30	21 20 R & L Dec 2709 3½ Morris Dec 281	Cents Beyond		4.59
ford Tenn	670	36400	50.96		60	06	13 Southern Dec 5915 3½ Morris Dec 281	Cents Beyond		8.58
										9.18

AGENT.

DATE	WB	CAR NUMBER	CONSIGNEE
1-23-15	404✓	NOM&C 4320	W.H. SETTLE
1-21-15	457	PCo 532894	" "
5-24-13	627✓	MP 34993	" "
5-24-13	627	PRR 823094	" "

	TOTAL FREIGHT CHARGES PAID			SHOULD BE	
20.	21 3.2-24.2	30000 - 34000	82.53	Newton, Miss. ✓ 21·3.7 = 24.7	
	21 3 2-24 2	41800	112.14	Stratton, Miss.	24.5
	21-22	42880	94.33	Vacherie, La. ✓ 21· 3½ = 24.5	
	21-22	51500	119.25	Panola, Ala.	24.5
		TOTAL	$15377.95		

WEIGHT	CHARGES PAID		SHOULD BE			UNDERCHARGE	
82.53		Newton, Miss. ✓ 21-3.7	= 24.7	84.22	NO&NE	(I.C.C. 2709 (Morris'ICC 490	1.70
112.14		Stratton, Miss.	24.5	113.39	IC	I.C.C. 3999	1.25
94.33		Vacherie, La. ✓ 21-3½	= 24.5	105.06	T&P	(I.C.C. 2006 (Morris'ICC 281	10.73
119.25		Panola, Ala.	24.5	132.13	M&O	I.C.C. A-844	12.88
$15377.95				$16717.83			$1339.88

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Appearance of Counsel.

(Filed Nov. 12, 1920.)

Arthur B. Mussman,
Clerk of said Court:

Please enter my appearance as counsel for the Plaintiff in Error.
GEO. HOADLY.

Cause Argued and Submitted.

(March 14, 1921.—Before Knappen, Denison, and Donahue, JJ.)

This cause is argued by Mr. George Hoadly for the plaintiff in error and by Mr. W. W. Clippinger for the defendant- in error and is submitted to the Court.

Judgment.

(Filed April 15, 1921.)

Error to the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be and the same is hereby affirmed with costs.

Opinion.

(Filed April 15, 1921.)

Filed Apr. 15, 1921. Arthur B. Mussman, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. 3500.

THE B. & O. SOUTHWESTERN RAILROAD, Plaintiff in Error,

vs.

W. H. SETTLE and GEORGE W. CLEPHANE, Defendants in Error.

Error to the District Court of the Southern District of Ohio.

Submitted March 14, 1921; Decided April 15, 1921.

Before Knappen, Denison, and Donahue, Circuit Judges.

Per Curiam:

Plaintiff in error, which owns and operates a railroad from Cincinnati, Ohio, to Louisville, Kentucky, and other points, sued defendants in error, who were engaged in the lumber business at Madisonville, Ohio, for the difference between the published through tariffs upon certain shipments of lumber originating south of the Ohio River, and which were either consigned to defendants at Oakley, Ohio (which is within the switching district of Cincinnati), or which were originally consigned to others at Cincinnati or elsewhere and were purchased by defendants while in transit and upon arrival at Cincinnati switched to Oakley—the freight charges being, in each case, fully paid either at Oakley or before reaching that point. There were in force lawful interstate rates from the points of origin of the several shipments to Cincinnati and Oakley (the rates to Oakley being the same as to Cincinnati) as well as to Madisonville—both Oakley and Madisonville being within the corporate limits of Cincinnati. There was a lawful local or intra-state rate (published by state authority) from Oakley to Madisonville. Each of the cars here in question was ordered by defendants to be delivered to them at Oakley. On reaching that place, plaintiff put the cars in its bulk yard and notified defendants of their arrival, whereupon the latter receipted for the cars which were then transported by plaintiff to defendants at Madisonville on new bills of lading at the intra-state rates betwen Oakley and Madisonville, plaintiffs charging defendants demurrage or car service for the time of detention at Oakley beyond the free-time limit. It was testified by plaintiff's general freight agent that when the cars were received at Oakley they were treated by both plaintiff and defendants as ship-

ments to Oakley. The interstate rate from the point of origin to Madisonville in each case exceeded the interstate rate to Oakley plus the intra-state rate from Oakley to Madisonville. The recovery of this excess is sought upon the proposition that notwithstanding the local transportation on new bills of lading from Oakley to Madisonville, the shipments retained their original interstate character as being merely continuations of the original interstate shipments from the points of origin to Oakley. This court reversed the action of the court below in overruling a demurrer to the petition in a suit first brought for this same recovery, holding that "the character of the shipment from Oakley to Madisonville is to be ultimately tested by the consideration whether or not there was an actual good faith delivery of the shipments to the consignees at Oakley, and actually a new and independent shipment therefrom by defendants to Madisonville while the lumber was physically present in their possession, and that the effect of such a good faith delivery, possession and independent shipment is not, as a mere matter of law, converted into an interstate shipment by the existence of an original and continuing intention to so reship in intra-state commerce for the saving of expense" (249 Fed. 913, 918). Plaintiff then discontinued that action and brought the instant suit. Upon trial by jury on issues of fact properly framed, there were verdict and judgment for defendants. It further appeared upon the trial that defendants had no place of business at Oakley, but there was testimony that Oakley was their unloading and distributing point for lumber to be used at Oakley, Hyde Park or Pleasant Ridge, where defendants had jobs; that defendants could not tell, until the cars reached Oakley, whether they would have demand for the lumber there; but that the cars that ultimately went to Madisonville (the cars in question here) were intended from the beginning to go to Madisonville; that they were shipped to Oakley and reshipped from that place to Madisonville for the purpose of getting the lower freight rate. The jury was instructed that the real issue was whether the shipments in question "were in fact shipments to Oakley, with an actual good faith delivery to the defendants at Oakley, and reconsignments actually by the defendants, having received possession of the lumber at Oakley, to Madisonville"; that the existence of an original and continuing intention in the minds of the defendants to reship the lumber from Oakley to Madisonville for the purpose of saving expense was not of itself sufficient to convert the shipments into through shipments if there was otherwise a good faith delivery at Oakley; and that, in determining the question of good faith, the jury might take into consideration "any demurrage charges that the defendants may have had to pay for these cars while detained at Oakley" as well as "any team trackage charges that were imposed by reason of the detention" of the cars at that place.

We think this is a correct statement of the applicable law which was so fully discussed in our former opinion cited, as to make rediscussion here unnecessary.

We may add that we find nothing in Berwind-White Co. v. Chicago & Erie R. R. Co., 235 U. S. 371, or in Western Union Telegraph

Co. v. Foster, 247 U. S. 105, 113, or in McFadden v. Alabama Great Southern Railroad Co. (C. C. A. 3), 241 Fed. 562, opposed to the conclusion reached in our former review and here.

As to the McFadden case: We refer to the full discussion thereof contained in our former opinion (249 Fed., at pp. 916-917). In the Berwind-White case, the point decided was that demurrage might lawfully be charged at a reconsignment point short of ultimate destination, when such was the established practice. Not only is such holding consistent with an instruction that in determining the question of good faith delivery, the fact of demurrage payments might be considered, but in the Berwind-White case, the shipment seems to have been for reconsignment, which is not the case here. The West-rn Union case is generally in line with previous decisions of a class fully discussed in our former opinion.

The judgment of the District Court is accordingly affirmed.

Petition for Writ of Error.

(Filed May 2nd, 1921.)

The Baltimore & Ohio Southwestern Railroad Company, the plaintiff in error herein, comes now and says that on or about the 15th day of April, 1921, the United States Circuit Court of Appeals for the Sixth Circuit entered a judgment herein in favor of the defendants in error and against this plaintiff in error, in which judgment and proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff in error; all of which will more fully appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff in error prays that a writ of error may issue in this behalf out of the Supreme Court of the United States, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

GEO. HOADLY,
Attorney for Plaintiff in Error.

Assignment of Errors.

(Filed May 2, 1921.)

The plaintiff in error in this cause, in connection with its petition for a writ of error, makes the following assignment of errors which occurred upon the hearing of this cause in the United States Circuit Court of Appeals for the Sixth Circuit, towit:

1. Said United States Circuit Court of Appeals erred in affirming the judgment of the District Court of the United States for the Western Division of the Southern District of Ohio.

2. Said United States Circuit Court of Appeals erred in failing and refusing to reverse said judgment of the District Court of the United States for the Western Division of the Southern District of Ohio.

3. Said United States Circuit Court of Appeals erred in entering judgment in favor of defendants in error and against the plaintiff in error.

Wherefore plaintiff prays that the judgment of the said United States Circuit Court of Appeals may be reversed and that it may be restored to all things it has lost by reason thereof.

GEO. HOADLY,
Attorney for Plaintiff in Error.

Order Allowing Writ of Error.

(Filed May 2nd, 1921.)

This second day of May, 1921, came the plaintiff in error by its attorney and filed herein and presented to the court its petition praying for the allowance of a writ of error and assignment of errors intended to be urged by it; praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States; and that such other and further proceedings be had as may be proper in the premises;

Upon consideration whereof the court does allow a writ of error upon the plaintiff in error giving bond according to law in the sum of five hundred dollars.

LOYAL E. KNAPPEN,
United States Circuit Judge, 6th Circuit.

Bond on Writ of Error.

(Filed May 2nd, 1921.)

Know all men by these presents, That we, The Baltimore & Ohio Southwestern Railroad Company, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto W. H. Settle and George W. Clephane, partners under the firm name and style of W. H. Settle & Co., in the full and just sum of Five Hundred Dollars, to be paid to the said W. H. Settle and George W. Clephane, partners under the firm name and style of W. H. Settle & Co., certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 2d day of May, in the year of our Lord one thousand nine hundred and twenty-one.

Whereas, lately at a United States Circuit Court of Appeals for the Sixth Circuit in a suit depending in said Court, between The Baltimore & Ohio Southwestern Railroad Company, plaintiff in

error, and W. H. Settle and George W. Clephane, partners und
the firm name and style of W. H. Settle & Co., defendants in erro
a judgment was rendered against the said The Baltimore & Oh
Southwestern Railroad Company and the said The Baltimore & Oh
Southwestern Railroad Company having obtained a writ of error a
filed a copy thereof in the Clerk's Office of the said Court to rever
the judgment in the aforesaid suit, and a citation directed to the sa
W. H. Settle and George W. Clephane, partners under the firm nam
and style of W. H. Settle & Co. citing and admonishing them to
and appear at a Supreme Court of the United States at Washingto
within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if t
said The Baltimore & Ohio Southwestern Railroad Company sh
prosecute its writ of error to effect, and answer all damages and co
if it fail to make its plea good, then the above obligation to be voi
else to remain in full force and virtue.

THE BALTIMORE & OHIO SOUTHWESTERN
RAILROAD CO., [SEAL.]
By GEO. HOADLY.
AMERICAN SURETY COMPANY OF NEW
YORK, [SEAL.]
By EARL H. SCHIER,
Resident Vice-President.

Attest:
LAIRY CRAIN,
Resident Asst. Secy. [SEAL.]

Sealed and delivered in the presence of
EVELYN BOHL.
FLORENCE KORB.

Approved by
LOYAL E. KNAPPEN,
U. S. Circuit Judge for the Sixth Circuit.

Præcipe for Record.

(Filed May 2nd, 1921.)

To the Clerk of the United States Circuit Court of Appeals for t
Sixth Circuit:

In making up the record for the writ of error in the Supre
Court of the United States in the above entitled cause, please inclu
the following papers:

1. The printed record of the proceedings in the District Court fi
in this Court.

2. All proceedings had in this Court.

3. Petition for the allowance of a writ of error.

4. Assignment of errors.

5. Bond.

6. Order allowing writ of error.

7. Writ of error.

8. Citation.

GEO. HOADLY,
Attorney for Plaintiff in Error.

UNITED STATES OF AMERICA, *ss:*

To W. H. Settle and George W. Clephane, partners under the firm name and style of W. H. Settle & Co., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Circuit Court of Appeals for the Sixth Circuit, wherein the Baltimore & Ohio Southwestern Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Loyal E. Knappen, U. S. Circuit Judge for the Sixth Circuit, this second day of May, in the year of our Lord one thousand nine hundred and twenty-one (1921).

LOYAL E. KNAPPEN,
U. S. Circuit Judge for the Sixth Circuit.

[Endorsed:] Filed May 2, 1921. Arthur B. Mussman, Clerk.

Service of the within citation is hereby acknowledged this 2nd day of May 1921.

W. W. CLIPPINGER,
Atty. for Defendants in Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, between The Baltimore & Ohio Southwestern Railroad Company, plaintiff in error, and W. H. Settle and George W. Clephane, partners under the firm name and style of W. H. Settle & Co., a manifest error hath happened, to the great damage of the said The Baltimore and Ohio Southwestern Railroad Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concern-

ing the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 2nd day of May, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal of the United States Circuit Court of Appeals, Sixth Circuit.]

ARTHUR B. MUSSMAN,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

Allowed by
LOYAL E. KNAPPEN,
U. S. Circuit Judge for the Sixth Circuit.

[Endorsed:] 3500. Writ of Error. Filed May 2, 1921. Arthur B. Mussman, Clerk.

United States Circuit Court of Appeals for the Sixth Circuit.

I, Arthur B. Mussman, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings, in the case of The Baltimore & Ohio Southwestern Railroad Company, Plaintiff in Error, vs. W. H. Settle and George W. Clephane, Partners under the firm name and style of W. H. Settle & Co., Defendants in Error, No. 3500, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof, together with the original citation and writ of error.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 7th day of May, A. D. 1921.

[Seal of the United States Circuit Court of Appeals, Sixth Circuit.]

ARTHUR B. MUSSMAN,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

Endorsed on cover: File No. 28,276. U. S. Circuit Court Appeals, 6th Circuit. Term No. 919. The Baltimore & Ohio Southwestern Railroad Company, plaintiff in error, vs. W. H. Settle and George W. Clephane, partners, under the firm name and style of W. H. Settle & Co. Filed May 20th, 1921. File No. 28,276.

IN THE

Supreme Court of the United States

No. 919, of October Term, 1920

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY,

Plaintiff in Error,

vs.

W. H. SETTLE and GEORGE W. CLEPHANE, partners under the firm and style of W. H. Settle & Company,

Defendants in Error.

Brief for Plaintiff in Error

PRELIMINARY

This case comes into this court from the Circuit Court of Appeals for the Sixth Circuit. That court affirmed a judgment rendered by the District Court of the United States for the Western Division of the Southern District of Ohio. The error which we claim was committed by the Circuit Court of Appeals consisted in affirming the judgment of the District Court.

This necessarily involves the examination and discussion of the rulings of the District Court and if we satisfy this court (as we feel confident we can), that those rulings were erroneous, it necessarily follows that the judgment

from points in the south to Oakley, the payment of the charges thereon from the points of origin to Cincinnati, the forwarding of the shipments from Oakley to Madisonville, and after admitting and denying sundry allegations of the petition not material to the questions now involved, denied (Rec., p. 6) that they did not at any time intend to receive these shipments or any of them at Oakley.

The case was tried before Judge Peck and a jury, and a verdict was rendered in favor of the defendants. A motion for a new trial having been overruled, the plaintiff took a bill of exceptions, including all the evidence, and filed its petition in error to reverse the judgment below.

The evidence showed (testimony of Pearl M. Grate, pp. 9, 10) that the cars in question arrived in Cincinnati from the south, some of them over the line of the plaintiff, others over other lines of railway; that they were then sent to Oakley; that when they reached Cincinnati over the plaintiff's line the agent at Oakley collected the charges; when they reached Cincinnati over other lines they came to Oakley with all charges paid; that when the shipments reached Oakley they were placed in what is called the bulk yard, and the defendants were notified of their arrival; that defendants then receipted for the cars and presented to the agent for execution new bills of lading for the forwarding of the cars from Oakley to Madisonville. These new bills of lading were made out on forms furnished by the plaintiff to the defendants in conformity to general practice. The agent then made arrangements to send the cars to Madisonville and they accordingly went to that place. The witness further testified (pp. 10, 11) that, so far as he could remember, none of the cars in question were put on team tracks at

Oakley, although a few might have been, but that the great majority at least of the cars embraced in this claim never left the bulk yard until they were ordered to Madisonville. He also said (Rec., p. 11) that during the period in which the shipments in controversy were made he could not remember defendants unloading any cars at Oakley and that if they did they were very few indeed.

The witness P. D. Freer by his testimony (Rec., pp. 12 and 18) reduced the amount claimed to a total sum of $825.10, the difference between that sum and the amount claimed in the petition having been shown by the plaintiff to be an erroneous claim was by consent of plaintiff excluded by the court from the consideration of the jury. He also testified (Rec., p. 13) that all the shipments left in this case after the withdrawal just mentioned were taken to Oakley at the same rate as would have been charged had they been delivered at Cincinnati proper, that while in some cases a switching charge was added it had afterward been eliminated.

The plaintiff also called as a witness one of the defendants, George W. Clephane, who testified (Rec., p. 17) that defendants had a lumber yard at Madisonville and a switch track leading into it, that they had at the time of the shipments in question no lumber yard at any other place, that they had no mill but simply sold the lumber as they received it. He further testified that some of the shipments in question were bought before they were shipped and that others were bought from dealers or otherwise, while they were in transit, that some of the shipments were consigned to Oakley, some to Cincinnati, and some might have been consigned to other places and the destinations changed to either Oakley or Cincinnati, and that such as were consigned to Cincinnati were sent

to Oakley by order of the defendants. He further testified (Rec., p. 17):

> "With reference to the shipments involved in this case, they were intended to go to Madisonville, and the cars involved in the controversy were intended from the beginning to go to Madisonville."

The defendants then called the defendant Clephane as a witness, who testified that the cars in question were shipped to Oakley and then reshipped from Oakley to Madisonville for the purpose of getting a lower rate.

In other respects the testimony for the defendants did not materially affect the question we wish to present to this court, nor did it contradict or vary the testimony on behalf of the plaintiff.

The court charged the jury among other things as follows (Rec., pp. 27, 28):

> "Now I charge you that as a matter of law, the existence of an original and continuing intention in the minds of the defendants, Settle and Clephane, to reship this lumber from Oakley to Madisonville, for the purpose of saving expense, is not, of itself, sufficient to convert the shipments into through shipments, if there was otherwise a good-faith delivery at Oakley. In other words, what I mean is this: If there was a good-faith delivery of this lumber at Oakley, to Settle and Clephane, the fact that they always had an intention in their minds and persevered in that intention of reshipping it to Madisonville for the purpose of saving money in freight, that would not necessarily constitute a through shipment in interstate commerce."

To this part of the charge the plaintiff duly excepted, and (Rec., p. 30) requested the court to charge that such

an intention to reship the lumber from Oakley to Madisonville did make the shipment an interstate shipment. This court did not do, but thereupon it further charged the jury as follows:

> "I would further charge this, that the existence of such an intention to reship, an original and continuing intention to reship from Oakley to Madisonville, is not necessarily and of itself conclusive evidence of an interstate shipment, but, of course, such intention may be taken into consideration in connection with the other facts and circumstances of the case." To which further instruction the plaintiff duly excepted. (Rec., p. 30.)

The plaintiff also excepted to this further instruction, given by the court as follows (Rec., pp. 28, 30 and 36):

> "You may take into consideration any demurrage charges that the defendants may have had to pay for these cars while detained at Oakley. You may take into consideration any team trackage charges that were imposed by reason of the detention of these cars at Oakley."

ARGUMENT.

An Original and Continuing Intention to Reship a Shipment Received in Interstate Commerce, Followed by Such Re-shipment, Makes the Transit a Continuous Transaction in Interstate Commerce, Even Though the Re-shipment be Between Points in the Same State.

The facts in the present case are not disputed. Defendants bought lumber at various points in the southern states or while in transit from such points (Rec., p. 17). They intended from the time it was bought that it should

go to Madisonville (Rec., p. 17). They had it shipped to Oakley, in some cases direct in some by having it switched from Cincinnati (Rec., p. 17). When it reached Oakley they had it re-shipped to Madisonville in the same cars (Rec., pp. 10 and 17). New bills of lading were made out, and, in some cases, but not in all, signed for this re-shipment (Rec., pp. 10 and 11). Their lumber yard was at Madisonville. They had a private siding leading into this lumber yard. They had no lumber yard at Oakley. Their offices were at Madisonville and Hyde Park. They had no office at Oakley.

On these facts, the learned trial judge instructed the jury that—

> "As a matter of law the existence of an original and continuing intention in the minds of the defendants Settle and Clephane to re-ship this lumber from Oakley to Madisonville for the purpose of saving expense, is not of itself sufficient to convert the shipments into through shipments if there was otherwise a good-faith delivery at Oakley. In other words, what I mean is this: If there was a good-faith delivery of this lumber at Oakley to Settle and Clephane, the fact that they always had an intention in their mind, and persevered in that intention, of re-shipping it to Madisonville for the purpose of saving money on freight, that would not necessarily constitute a through shipment in interstate commerce" (Rec., pp. 27 and 28).

And again in response to the plaintiff's request to charge that such an existing and continuous intent to re-ship lumber from Oakley to Madisonville did make the shipment an interstate shipment, the court further charged the jury (Rec., p. 30):

> "I would further charge this, that the existence of such an intention to re-ship, an original

> and continuing intention to reship from Oakley to Madisonville is not necessarily and of itself conclusive evidence of an interstate shipment, but, of course, such intention may be taken into consideration in connection with the other facts and circumstances of the case."

To these instructions the plaintiff duly excepted and assigned them as errors (Rec., pp. 35 and 36).

These rulings of the trial court are in direct conflict with a series of decisions of this court.

In *Ohio Railroad Commission* v. *Worthington*, 225 U. S., 101, this court said (p. 110):

> "That the test of through billing is not necessarily determinative is shown in the late case of *Southern Pacific Terminal Company* v. *Interstate Commerce Commission and Young*, 219 U. S., 498. In that case Young bought cotton seed cakes at various points in Texas and shipped them to himself at the port of Galveston, where they were prepared for export. This court held that such transportation was within the jurisdiction of the Interstate Commerce Commission and that the special privileges given by the Southern Pacific Terminal Company to Young on the wharf at Galveston were undue preferences in his favor. As to the fact that the shipments were not made on through bills of lading, but were to Galveston from other places in Texas, this court said (p. 527):
>
> 'It makes no difference, therefore, that the shipments of the products were not made on through bills of lading or whether their initial point was Galveston or some other place in Texas. They were all destined for export and by their delivery to the Galveston, Harrisburg and San Antonio Railway they must be considered as having been

> delivered to a carrier for transportation to their foreign destination, the Terminal Company being a part of the railway for such purpose. The case, therefore, comes under *Coe* v. *Errol*, 116 U. S., 517, where it is said that goods are in interstate, and necessarily as well in foreign commerce when they have actually started in the course of transportation to another state, or delivered to a carrier for transportation.'"

In *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S., 498, quoted in the case last cited, it appears (see p. 526) that the shipments of cotton seed cake with respect to which the alleged discrimination arose were not merely billed to Young at Galveston but were actually delivered to him there and were there ground into meal by him and put into sacks before they were loaded on board ship, yet this court held that the movement was in foreign commerce throughout.

To the same effect are *Texas & N. O. R. R.* v. *Sabine Tram Co.*, 227 U. S., 111, and *Railroad Commission of Louisiana* v. *Texas & Pacific Ry. Co.*, 229 U. S., 336.

In that case this court said, referring to the cases cited above:

> "In those cases there was necessarily a local movement of freight, and it necessarily terminated at the seaboard. But it was decided that its character and continuity as a movement in foreign commerce did not terminate, nor was it affected by being transported on local bills of lading. The principle enunciated in the cases was that it is the essential character of the commerce, not the accident of local or through bills of lading which determines Federal or state control over it. And it takes character as interstate or foreign commerce when it is actually started in the course of transportation to another state or to a foreign country." (p. 341.)

If this be sound, and we can feel no doubt of it, when the character of interstate commerce has once been acquired, the mere accidents of billing do not change it and the shipments in question remained in interstate commerce until they reached Madisonville and were there unloaded by the defendants who intended them from the first for that destination.

In *Illinois Central Railway Company* v. *Louisiana Railroad Commissioners*, 236 U. S., at page 163, this court said:

> "When freight actually starts in the course of transportation from one state to another it becomes a part of interstate commerce. The essential nature of the movement and not the form of the bill of lading determines the character of the commerce involved. And generally when this interstate character has been acquired it continues *at least* until the load reaches the point where the parties originally intended that the movement should *finally* end." (Italics ours.)

In *Pennsylvania R. R. Co.* v. *Clark Coal Co.*, 238 U. S., 456, at pp. 465, 466, this court said:

> "In determining whether commerce is interstate or intra-state, regard must be had to its essential character. Mere billing, *or the place at which title passes*, is not determinative. If the actual movement is interstate the power of Congress attaches to it and the provisions of the act to regulate commerce, enacted for the purpose of preventing and redressing unjust discrimination by interstate carriers, whether in rates or facilities, apply." (Italics ours.)

In *Southern Railway* v. *Prescott*, 240 U. S., 632, at p. 639 this court said:

> "In determining, in this view, whether the contract had been discharged, and the case removed from the operation of the federal act, regard must of course be had to the substance of the transaction. The question is not one of form, but of actuality. It is apparent that there had been no actual delivery of the nine boxes. The payment of the freight had no greater efficacy than if it had been made in advance of the transportation. The giving of a receipt for the goods by the consignee did not alter the fact that they were still held by the Railway Company awaiting actual delivery. * * * As it has often been said, the statutory provisions manifest the intent of Congress that the obligation of the carrier with respect to the services within the purview of the statute shall be governed by uniform rule in the place of the diverse requirements of state legislation and decisions."

In *Atchinson, Topeka & Santa Fe Railway Co.* v. *Harold*, 241 U. S., 371, the facts were as follows: A car of bulk corn was shipped from Yanka, Nebraska, to Topeka, Kansas, and a bill of lading issued for such shipment; while in transit it was sold and the purchaser at Kansas City, Missouri, surrendered the original bill of lading and the carrier's agent at Kansas City issued a new one for the same car reading from Kansas City to Elk Falls, Kansas. As a matter of fact the car never went to Kansas City at all, but was forwarded from Topeka to Elk Falls. This court held in reversing the Supreme Court of Kansas that the movement of the car was a continuous interstate journey and that the forwarding of it from Topeka to Elk Falls was not a separate intrastate shipment subject to state laws.

We can see no difference between that case and this except that there the original and continuing intention to reship was not present.

In *Western Union Telegraph Co.* v. *Foster*, 247 U. S., 105, the Supreme Court said, p. 113:

> "It is admitted that the transmission" (of stock exchange quotations) "from New York to Massachusetts by the Telegraph Company was interstate commerce. If so, it continued such until it reached 'the point where the parties originally intended that the movement should finally end.'"
>
> *Illinois Central R. R. Co.* v. *Louisiana R. R. Commission*, 236 U. S., 157, 163.

We also call the attention of the court to *McFadden* v. *Alabama Great Southern R. Co.*, 241 Fed., 562, affirming *Alabama Great Southern Railroad* v. *McFadden*, 232 Fed., 1000, which seems to us indistinguishable from the present case.

In a very careful and learned opinion of the Appellate Court of Illinois (*Douglas Co.* v. *Southern Ry. Co.*, 216 Ill. App., 148) in which the decisions of this court are fully reviewed the court said (p. 155):

> "The essential nature of the movement, and not the form of the bill of lading, determined the character of the commerce involved. When the character of interstate commerce has once been acquired it continues until the load reaches the ultimate point of destination intended, which does not necessarily depend upon the form of the bill of lading or whether there has been a trans-shipment enroute with a new bill of lading for the balance of the journey."

Another consideration presents itself which shows that the transportation to Madisonville was merely a part of

a continuous interstate movement. Section 7 of the Act to Regulate Commerce (24 Statutes at Large, 382), provides:

> "That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and from being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act."

In this section Congress has declared the policy of the act which is that carriage that is really continuous should be treated as such and that what is really one transaction should not be split up into two for the purpose of evading the provisions of the act. If the carrier is not permitted to evade this policy of the act neither should the shipper be. Moreover in this case it would seem at least probable that the device which was practiced was suggested by an agent of the carrier. One of the defendants (Settle, Rec., p. 21) says with reference to the adoption of this plan: "I consulted the general freight agent, Mr. Sam McLaughlin."

II.

Error With Respect to "Good Faith Delivery at Oakley."

The charge of the court as excepted to and as set out in the second and third assignments of error was also in error in that it left to the jury to consider whether or not there was a delivery of these shipments to the defendants at Oakley in good faith. This was wrong because there was no evidence of any delivery of these shipments to defendants at Oakley in good faith or otherwise.

The evidence on this subject is as follows. Grate testified (Rec., p. 9):

> "When shipments arrived at Oakley, the first thing done was to notify the consignee that the shipment was at Oakley. In some cases the shipments were placed on team tracks. In others they were not but were held in what is called the bulk yard; and in all cases in the statement herein designated as Plaintiff's Exhibit No. 1 these cars were ordered forwarded to Madisonville. This statement was prepared in my office by Mr. Asher and Mr. Hall from the records of my office. Cars were receipted for by Messrs. Settle and Clephane as having been delivered to them at Oakley, and thereupon they presented me with a bill of lading for each car to cover the movement of the car from Oakley to Madisonville. * * *
>
> "I can not say definitely from memory but I think that the records would show that none of the cars embraced in this claim were actually placed upon the team track although it is possible that a few may have been. The team track is one side of the main line and the bulk yard is

> on the other side. The cars always came in first to the bulk yard, even though they were finally placed on the team track, and in the great majority at least of the cases embraced in this claim, the cars never left the bulk yard until they were ordered to Madisonville. * * *
>
> "None of these cars were shipped through Oakley in the train in which they arrived there. They were all switched off at Oakley and held there until instructions were received to ship them to Madisonville."

Defendant Clephane testified (Rec., p. 17):

> "With reference to the shipments involved in this case they were intended to go to Madisonville, and the cars involved in the controversy were intended from the beginning to go to Madisonville."

This is all the testimony on this subject and does not show any delivery of these shipments to the defendants at Oakley except the averment contained in an amendment to the petition in a former suit involving the same shipments (Defendant's Exhibit A, Rec., at p. 32) as follows:

> "Plaintiff further says that each of said shipments upon its arrival at Oakley Ohio, was received by the defendants, although the lumber was not removed from the cars, and that subsequently the shipments were by the direction of the defendants moved to Madisonville, Ohio."

This is entirely consistent with the other testimony and shows that there was in fact no delivery to the defendants at Oakley. That what happened was as stated by Grate and not disputed by either of the defendants though both of them testified in the case. "Cars were

receipted for by Messrs. Settle and Clephane as having been delivered to them at Oakley, and *thereupon* they presented me with a bill of lading for each car to cover the movement of the car from Oakley to Madisonville." (Rec., p. 10.)

It is manifest, therefore, that what happened was as stated by Grate. The cars, destined for Madisonville came to Oakley, defendants receipted for them and at once prepared and presented to Grate for signature a new bill of lading for their transportation to Madisonville. This was not a delivery to the defendants at Oakley at all. Still less was it a "good-faith delivery."

If it be considered as a delivery it was a mere sham done for the purpose of creating an apparent break in the transportation when there was no real break and there never had been any intention of accepting a real delivery of the lumber at Oakley. To apply the words of this court in *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U. S., at p. 526:

> "To hold otherwise would be to disregard as the commission said the substance of things and make evasions of the Act of Congress quite easy."

III.

Error in Permitting the Jury to Consider Demurrage and Team Track Charges.

The court charged the jury as follows:

> "Therefore, what then is a good-faith delivery to them at Oakley and an actual new and independent reshipment to Madisonville?
>
> "In determining that question * * * you may take into consideration any demurrage charges that the defendants may have had to

> pay for these cars while detained at Oakley. You may take into consideration any team trackage charges that were imposed by reason of the detention of these cars at Oakley." (Rec., p. 28.)

This was a manifest error. The charging of demurrage on cars held for reconsignment is a practice so well known that this court has taken judicial notice of it in *Berwind White Coal Mining Company* v. *Chicago & Erie Railroad Company,* 235 U. S., 371, and that demurrage was charged on these cars is therefore no evidence of a delivery to defendants and ought not to have been considered by the jury as bearing on the question.

The same applies to the team trackage charges and in addition we may call attention to the testimony of the witness Grate who testifies that the team track charge was made only when cars were put on team tracks (Rec., p. 10); that all, or at least, the great majority of the cars involved in this controversy remained in the bulk yard and were not put on the team tracks (Rec., pp. 10 and 11), that when the cars arrived in Cincinnati over lines other than the B. & O. S. W. the team trackage charge of two dollars was not collected (Rec., p. 12) and that "The shipments involved in this controversy mostly came from the south over the Louisville & Nashville and Southern Railroads, but a few came from the south over the line of the B. & O. S. W. R. R." (Rec., p. 9.)

Also the testimony of Freer who testified "The tariffs from competitive points on the lines of the Louisville & Nashville and the Southern Railway provided that Oakley for the purposes of such shipment was a part of Cincinnati, and that the line of railway bringing such shipment to Cincinnati would absorb or pay the switching charges of the Baltimore & Ohio Southwestern Rail-

road between Cincinnati and Oakley, so that such shipments were delivered at Oakley at the same rate as at Cincinnati; such charges so absorbed by the Southern lines including the team track charge" (Rec., p. 13) so that as to the shipments which came from the south over the Louisville & Nashville and Southern railroads—all but a few of those involved in the present litigation—the question whether a team trackage charge was or was not made only related to the division of the rate between the carriers and in no way affected the amount to be paid by the defendants.

Again Freer testified "In all cases embraced in this statement where the switching charge to Oakley was added that amount has either been credited in the statement or the car has been eliminated from the statement, so that the amount claimed in this case is only the difference between the rate to Oakley and the rate to Madisonville." (Rec., p. 14.) There is an error here but it is made plain by the rest of the record. What the witness should have said in order to state the claim correctly was "the difference between the sum arrived at by adding to the rate to Oakley the local rate from Oakley to Madisonville and the rate to Madisonville" so that the error becomes entirely immaterial. It results then that as a practical result there are no cars involved in this controversy on which defendants paid either a switching charge or a team track charge and that the question of team track charges is immaterial.

The court, therefore, was in error in allowing the jury to consider as evidence of delivery either demurrage or team track charges on the cars in question.

We may add that demurrage was charged on only four cars out of the whole number in controversy (Rec., pp. 15 and 16) and if these four were omitted it would re-

duce the amount of the claim by less than thirty-five dollars.

For the reasons given above justice requires that the judgment of the court below should be reversed. And we accordingly ask for a reversal on all the grounds set out in the assignment of error.

Respectfully submitted,

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EDWARD COLSTON,
GEORGE HOADLY,

Attorneys for Plaintiff in Error.

December, 1921.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1922.

No. 383

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,

Plaintiff in Error,

vs.

W. H. SETTLE AND GEORGE W. CLEPHANE, PARTNERS UNDER THE FIRM NAME AND STYLE OF W. H. SETTLE & COMPANY,

Defendants in Error,

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR DEFENDANTS IN ERROR.

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Attorney for Defendants in Error.

JUDD & DETWEILER PRINTING COMPANY, WASHINGTON.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1922.

No. 325

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,

Plaintiff in Error,

vs.

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Defendants in Error,

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR DEFENDANTS IN ERROR.

A. STATEMENT OF THE CASE.

A-1. PRELIMINARY STATEMENT.

This is a proceeding in error to the United States Circuit Court of Appeals for the Sixth Circuit, to review a judgment of that tribunal which affirmed a judgment of the District Court of the United States for the Western Division of the Southern District of Ohio.

For uniformity, we adopt the plan pursued by counsel for plaintiff in error, and shall refer in this brief to the parties as they stood in the trial court and the Circuit Court of Appeals, and designate them as plaintiff and defendants, respectively.

A brief statement of the case is impelled by reason of the insufficiency of the statement made in the brief filed on behalf of the plaintiff in error.

In the case of *Settle et al.* v. *Baltimore & Ohio Southwestern Railroad Company* (decided May 7, 1918), 249 Fed. Rep. 913, 918, 162 C. C. A. 111, 116, the United States Circuit Court of Appeals, Sixth Circuit, reversed the action of the United States District Court, Southern District of Ohio, Western Division (the same trial court herein, although in the original case, judgment was rendered by Mr. District Judge Hollister, now deceased, while in the case at bar, Mr. District Judge Peck presided), in overruling a demurrer to the petition in a suit first brought by the plaintiff herein against the defendants herein for this same recovery, holding that (italics ours):

> "* * * the character of the shipment from Oakley (*Ohio*) to Madisonville (*Ohio*) is to be ultimately tested by the consideration whether or not there was an actual good-faith delivery of the shipments to the consignees at Oakley, and actually a new and independent shipment therefrom by defendants to Madisonville while the lumber was physically present and in their possession, and that the effect of such good-faith delivery, possession and independent reshipment is not, as a mere matter of law, converted into an interstate shipment by the existence of an original and continuing intention to so reship in intrastate commerce for the saving of expense." (*Reaffirmed in case at bar by Circuit Court of Appeals, Record, p.* 52.)

The Circuit Court of Appeals, in reversing the judgment of the District Court, remanded the record to that court with directions to take further proceedings not inconsistent with its opinion. The plaintiff then discontinued that action and brought the instant suit. Upon trial by jury on issues of fact properly framed, there were verdict and judgment for defendants. The judgment of the District Court was affirmed by the United States Circuit Court of Appeals for the Sixth Circuit in error proceedings brought by the plaintiff, whereupon the plaintiff instituted the within error proceedings before this Honorable Court.

In the case at bar, the Circuit Court of Appeals, in reaffirming the above proposition of law, stated (italics ours):

> "The jury was instructed * * *; that *the existence of an original and continuing intention in the minds of the defendants to reship the lumber to Madisonville for the purpose of saving expense was not of itself sufficient to convert the shipments into through shipments if there was otherwise a good-faith delivery at Oakley;* and that, in determining the question of good faith, the jury might take into consideration 'any demurrage charges that the defendants may have had to pay for these cars while detained at Oakley' as well as 'any team trackage charges that were imposed by reason of the detention' of the cars at that place.
>
> *"We think this is a correct statement of the applicable law which was so fully discussed in our former opinion cited, as to make rediscussion here unnecessary."* (Record, p. 52.)

At this point, counsel for the defendants in error in this proceeding begs to state to the court that although he represented the defendants in the original case (*Settle et al.* v. *Baltimore & Ohio Southwestern Railroad Company*, 249 Fed. Rep. 913; 162 C. C. A. 111), he did not

represent the defendants in the case at bar either in the trial court or in the Circuit Court of Appeals, but was engaged by the defendants for the first time to represent them in the error proceeding before this Honorable Tribunal.

The court's attention is respectfully directed to several significant typographical errors appearing in the record. On page 35 of the record, in the second assignment of error, the ninth line from the bottom of the page which reads "To which portion of the charge of the court the *defendant* thereupon," should read, "To which portion of the charge of the court the *plaintiff* thereupon." This correction is substantiated by the statement of Mr. Judge Peck on page 30 of the record.

On page 35 of the record, in the third assignment of error, the fifth line from the bottom of the page, which reads, "request of the *defendants* to instruct the jury," should read "request of the *plaintiff* to instruct the jury." This correction is substantiated by Mr. Judge Peck on page 30 of the record.

A-2. Statement of Facts.

Plaintiff is a corporation duly incorporated under the laws of the State of Ohio. Plaintiff owns and operates a line of railroad extending from Cincinnati, in the State of Ohio, to Louisville, in the State of Kentucky, and to other points in various states of the United States, and is engaged in commerce between the states as a common carrier by railway. (Allegation of petition, Record, p. 1; Admission in answer, Record, p. 5.) As such, the plaintiff is subject to all the provisions of the Interstate Commerce Act, and all acts amendatory thereof and supplemental thereto.

Defendants are and were at all times, set forth in the

plaintiff's petition, partners engaged in manufacturing and dealing in lumber at the Madisonville Station, being a station situated within the city limits of the City of Cncinnati on the line of railway of the plaintiff. (Allegation of petition, Record, p. 1; Admission in answer, Record, p. 5.)

Madisonville, Ohio, is located on the line of the plaintiff, a distance of 13.5 miles from its freight station at Front and Mill streets, Cincinnati, Ohio, and is not located within the so-called Cincinnati switching limits. Oakley, Ohio, is located on the line of the plaintiff, a distance of 11.8 miles from its said depot in Cincinnati, and is intermediate between Cincinati and Madisonville. Oakley, Ohio, is included within the Cincinnati switching limits, and is accorded the same rates as on traffic to Cincinnati proper from competitive points, *i. e.*, the interstate carriers have adopted a system of switching absorption on interstate traffic from Cincinnati to Oakley which is common to all large cities.

On shipments of lumber, in carload quantities, from competitive points in the South, destined to Oakley, Ohio, the lines bringing the traffic into Cincinnati, which embrace the Louisville & Nashville Railroad Company and Southern Railway Company, accord Oakley the same rates as Cincinnati, *i. e.*, they engage the plaintiff company to haul the cars from Cincinnati to Oakley and absorb that road's switching charges, including the team track charge, out of their revenue. So that, as far as the consignee who is located at Oakley, Ohio, is concerned, it receives the lumber at the same rate as the dealer of lumber in the downtown district of Cincinnati. (Testimony of plaintiff's witness, P. D. Freer, Record, p. 13.)

Madisonville, Ohio, although within the corporate

limits of Cincinnati, Ohio, is not included within the so-called Cincinnati switching limits, and the rates on lumber, in carload quantities, from southern points to that station are made, either on the Cincinnati combination, *i. e.*, the rate from point of origin to Cincinnati, plus the rate from Cincinnati to Madisonville, or else, joint through rates are maintained from the points of origin to Madisonville, Ohio, which are equivalent to the Cincinnati combination.

At the various times mentioned in the petition, there were in force, duly filed with the Interstate Commerce Commission and published as required by law, freight tariffs fixing the rates of freight between the points of origin of the several shipments mentioned in the account annexed to the petition, and City of Cincinnati, in the State of Ohio; and at said times there were likewise in force freight tariffs duly filed with said Interstate Commerce Commission and published as required by law, between the points of origin of said several shipments and the station of Madisonville, in the State of Ohio. (Allegation of petition, Record, pp. 1, 2; Admission in answer, Record, p. 5.)

By the rules and regulations of the plaintiff and other carriers, applicable to all shipments from the point of origin of each of the said several shipments, and which rules and regulations were duly filed with the Interstate Commerce Commission and published as required by law, it was provided that all shipments consigned to Oakley, Ohio, should be shipped to and delivered at said Oakley at the rates applicable to shipments to Cincinnati, Ohio. (Allegation of petition, Record, p. 2; Admission in answer, Record, p. 5.)

At the time each of the several shipments mentioned in the petition was made, and at the time each of the

said shipments reached its destination, there were in force, duly filed with the Railroad Commission or the Public Service Commission of the State of Ohio, and published as required by the laws of the State of Ohio, local rates upon shipments, of the class mentioned, from Oakley, Ohio, to Madisonville, Ohio, which said rates were in full force and effect as to shipments originating at said Oakley and destined to said Madisonville, being shipments within the State of Ohio; but said rates had not been filed with the Interstate Commerce Commission, nor had they been published as required by the Act to Regulate Commerce, and the same were not in force nor valid rates with respect to any shipments among the several states of the United States. (Allegation of petition, Record, p. 2; Admission in answer, Record, p. 5.)

At various times during the years 1913 and the succeeding years, certain shipments were made, some of which shipments were consigned to the defendants at Oakley, Ohio, by the order and direction of said shippers, and for which bills of lading or other contracts of shipment were issued at the points of origin of said shipments, and which bills of lading or other contracts showed the defendants as the consignees thereof, and Oakley, Ohio, as the destination thereof; and certain other shipments were also made from various points to Cincinnati, Ohio, or other points north of the Ohio River, and in which shipments the shippers, certain lumber brokers or other parties, are shown as the consignees thereof, which said shipments were purchased by the defendants in transit and before the same reached Cincinnati, Ohio, and that defendants ordered the lines bringing the cars containing such shipments into Cincinnati, to have the same delivered to the defendants at

Oakley, Ohio. (Allegation of petition, Record, pp. 2, 3; Admission in answer, Record, pp. 5, 6.)

The defendants paid to the various southern lines hauling the cars mentioned in said statement to Cincinnati the full interstate rates on all of said cars, and then ordered said cars to be delivered to the defendants at Oakley, Ohio, the defendants being entitled to have the same delivered at Oakley, Ohio, at the same rates as at Cincinnati, Ohio. Immediately upon arrival at each of said shipments at Oakley, Ohio, the same were placed upon the team tracks of the plaintiff at said Oakley, Ohio, and the defendants thereupon immediately notified of the arrival thereof; and thereafter the defendants directed the same to be forwarded to Madisonville, Ohio, *under a new bill of lading or contract of shipment.* (Allegation of petition, Record, p. 3; Admission in answer, Record, p. 6.)

It was testified by the plaintiff's General Freight Agent that, when the cars were received at Oakley, Ohio, they were treated by both the plaintiff and defendants as shipments to Oakley. (Testimony of plaintiff's witness, P. D. Freer, Record, p. 13; Statement, *per curiam*, Circuit Court of Appeals, Record, p. 51.)

None of the cars were shipped from Oakley in the same train in which they arrived there. They were all switched off at Oakley, Ohio, and held there until instructions were received by the defendant to ship them to Madisonville. (Testimony of plaintiff's witness, Pearl M. Grate, Record, pp. 11, 12.)

On all of the shipments mentioned in petition, with the exception of several cars which moved via New Albany, Indiana, or Louisville, Kentucky, and the plaintiff's line upon which the charges were collected at Oakley, Ohio, the plaintiff had nothing to do with the col-

lection of the charges on any of the shipments inasmuch as the plaintiff did not participate in the line haul and was simply engaged by the Louisville & Nashville Railroad Company and the Southern Railway Company as their agent in performing the switching service within the Cincinnati switching limits and the placement service on the public team tracks at Oakley, for which terminal services the plaintiff was duly compensated by the southern lines out of their revenue. (Testimony of plaintiff's witnesses, Pearl M. Grate, Record, p. 11, and P. D. Freer, Record, p. 13.)

The interstate rate from the point of origin to Madisonville in each case exceeded the interstate rate to Oakley, plus the intrastate rate from Oakley to Madisonville. The recovery of this excess is sought upon the proposition that notwithstanding the local transportation on new bills of lading from Oakley to Madisonville, the shipments retained their original interstate character as being merely continuations of the original interstate shipments from points of origin to Oakley. (Statement, *per curiam,* by Circuit Court of Appeals, Record, p. 52.)

The reasons for the defendants consigning the cars to Oakley and the method of handling at that point is best described by the testimony of the defendants' witness, George W. Clephane, as follows:

> "We were advised of the arrival of the cars, which were delivered at Oakley, by postal card notice from the agent at Oakley that the car was at Oakley awaiting disposition. We could not tell until the cars arrived at Oakley whether we would have demand for the lumber at Oakley. We treated Oakley as the destination of the shipments in question. Oakley was the unloading point for us. We could distribute from Oakley to Hyde Park or anywhere in Oakley or Pleasant Ridge or any place where we made our sales. We had teams and we hauled quite a lot of lumber from Oakley to various jobs which

we had, whether they were in Pleasant Ridge or Hyde Park or Oakley; and in addition we had the benefit of saving freight by shipping the lumber to Oakley, and if we did not need it there, then rebilling it. We took that into consideration in shipping to Oakley as destination. We had business all over that part of the city of Cincinnati and delivered lumber from Oakley to jobs wherever they were. The three points, Madisonville, Oakley and Hyde Park, are all within the corporate limits of Cincinnati, in the northeastern part of the city." (Testimony of defendants' witness, George W. Clephane, Record, p. 19.)

On the shipments in question, the plaintiff made a trackage charge of $2 per car for making the delivery on its public team track at Oakley, Ohio, and also assessed a demurrage or car-service charge at the rate of $1 per car per day on the cars which were detained beyond the free-time limit, and the said charges were paid by the defendants to the plaintiff. (Statement in defendants' answer, Record, p. 6. Uncontroverted by plaintiff.)

Inasmuch as the placement charge of $2 a car for delivery on the plaintiff's team track was paid to the plaintiff by the southern lines, and absorbed out of their revenues, such charge was unlawfully collected by the plaintiff from the defendants and a credit thereupon allowed by the plaintiff in the statement as testified by the plaintiff's General Freight Agent. (Testimony of plaintiff's witness, P. D. Freer, Record, p. 13.)

A-3. Statement of the Issue.

Aside from the proposition contained in the first assignment of error which is addressed to the admissibility of certain testimony of Pearl M. Grate, the plaintiff's witness, on cross-examination; and, the alleged error in the charge of the Court with respect to "good

faith delivery at Oakley" as set forth in the second and third assignments of error; and, the alleged error in the charge of the Court in permitting the jury to consider demurrage and team track charges as set forth in the fourth assignment of error, the major issue involved in all of the plaintiff's five assignments of error, and the proposition of law which controls the case at bar, is as follows:

The defendants contend that a shipper has the right under the Interstate Commerce Act to move a shipment in interstate commerce consigned to a given destination, pay the lawful charges upon it as governed by the lawfully published rates applicable thereto, assume custody of the property, and later ship it to another point under new bill of lading or contract of shipment, and subject to the rates lawfully applicable to such subsequent shipment. In other words, that the defendants in this case had the right to receive shipments of lumber at Oakley, Ohio, which originated at southern points and which were destined to said Oakley, Ohio, under lawful bills of lading and applicable thereto, and that when they paid the lawful interstate rates applicable to such shipments from the points of origin to Oakley, Ohio, as duly filed with the Interstate Commerce Commission, and took possession of the property, either physically or constructively, the original contract of transportation was terminated. That when the property was subsequently shipped from Oakley, Ohio, to Madisonville, Ohio, under a new bill of lading or contract of shipment, that such subsequent movement constituted *intrastate* commerce subject to the lawful rates applicable to such movement, duly filed with the Public Utilities Commission of Ohio. That the determinative feature of a shipment is an agreement between the shipper and the car-

rier at the inception of the carriage that the property shall be transported to a given destination, and that *whether a shipment is state or interstate depends solely upon the contract of transportation;* and, that this rule of law is not changed by the fact that the defendants *intended* to ultimately receive this traffic at Madisonville, Ohio, and intended thereby to avoid higher interstate rates from points of origin to Madisonville, Ohio, by availing themselves of a lower combination of charges on Oakley, Ohio, based on the interstate rates from the points of origin to Oakley, Ohio, plus the state rate from Oakley, Ohio, to Madisonville, Ohio. That inasmuch as the defendants have paid to the southern roads their duly published interstate rates on shipments of lumber from the points of origin to Oakley, Ohio, and have paid the Baltimore & Ohio Southwestern Railroad Company its duly published rate on said shipments from Oakley, Ohio, to Madisonville, Ohio, and no undercharges exist in favor of the plaintiff.

The defendants contend that a carrier's lawfully published tariff, duly filed with the Interstate Commerce Commission, is a standing offer to the public at large that it will receive and transport property between the points named therein, and that when a shipper delivers property to the carrier for interstate transportation and receives a bill of lading therefor, there is a contract subsisting between those parties, and the bill of lading furnishing the shipping directions, *i. e.,* the names of the shipper and consignee, the character of the goods, and the points of origin and destination of the traffic, and that the published tariff rate for transportation between the points named in the bill of lading is then read into the contract of shipment by operation of law. In other words, the bill of lading setting forth the points

origin and destination of the traffic is, so to speak, "yardstick" by which the transportation charges are be measured, and that the published tariff rate from nt of origin to the named destination is the only rge that may lawfully be assessed on such traffic. at, when under a contract of transportation the car- r transports the property to the agreed destination l there safely delivers the property to the consignee ulated, and the consignee pays the lawful charges, renders the bill of lading and accepts delivery of the perty, the contract is executed and any subsequent vement of such property under a new and independent tract is to be governed by the lawful rates applicable such movement. That no restriction may be placed n the use of a published interstate rate other than limitations, terms and conditions contained in the ff publishing such rate. That any denial to a ship- of the right to use a published tariff rate would re- in producing the very unjust discrimination which Interstate Commerce Commission was designed to vent.

he plaintiff, on the other hand, contends that inas- h as the traffic was ultimately received by the de- lants at Madisonville, Ohio, that the two movements ld be treated as continuous from the points of origin he traffic to Madisonville, Ohio, and that the charges ld have been assessed on basis of the through rates the points of origin to Madisonville, Ohio, as filed the Interstate Commerce Commission. *That the ntion of the shipper as to the point at which the traf- ultimately received should conform for the purpose ssessing freight charges, and not the point shown as destination in the bill of lading or contract of trans- ation issued to the shipper at the point of origin of*

the traffic. That the movement from Oakley, Ohio, to Madisonville, Ohio, is a part of the original interstate movement, regardless of the fact that Oakley, Ohio, was shown as the destination in the bills of lading covering the original movement, and also regardless of the fact that there were two distinct movements under two separate bills of lading. And that, therefore, the defendants owe the plaintiff the difference between the two interstate rates from the points of origin to Madisonville, Ohio, and the lower combination of rates on Oakley, Ohio, which was paid by the defendants.

B. ARGUMENT.

On account of the importance of the principle involved in this case, affecting so many and varied interests other than those of the defendants, an exhaustive analysis is here made of the decisions governing the subject by the United States Supreme Court, the lower courts and the Interstate Commerce Commission in their chronological sequence. The court's indulgence is, therefore, asked, if the brief seems voluminous.

An examination of the cases decided by the United States Supreme Court, beginning with the case of *Coe v. Errol,* 116 U. S., 517, 6 Sup. Ct. Rep., 475, 29 L. Ed., 715 (*decided January* 26, 1886), up to the present time, does not show that the principle enunciated in that case has ever been overruled or modified. Although probably well known to the court, the facts in the case of *Coe v. Errol, supra,* are as follows: Complainant and his associates in the lumber business owned a large number of spruce logs in 1880, which had been brought down the winter before from their property in New Hampshire, and placed in Clear Stream and on the banks thereof, in the town of Errol, N. H., to be floated down the Androscoggin river to the state of Maine to be manufactured and sold. The taxing authorities of the town of Errol assessed such logs for taxation, claiming them to be a part of the general mass of property subject to taxation in that state, Coe and his associates claiming that since the logs were intended for shipment to another state, that they were a part of interstate commerce and not taxable by the Errol taxing authorities.

The syllabus of this case reads as follows:

"3. Exportation is not begun until the goods are

committed to the common carrier for transportation out of the state to the state of their destination, or until they have started on their ultimate passage to that state. Until that time they are taxable as a part of the general mass of property in the state, although they are not taxable as exports.

4. The carrying of property in carts or vehicles, or floating it to the depot, where the journey is to commence, is no part of the exportation."

We quote from the opinion of the court at page 525:

"*Does the owner's state of mind in relation to the goods, that is, his intent to export them and his partial preparation to do so exempt them from taxation?* * * * *This question does not present the predicament of goods in course of transportation through a state, although detained for a time within the state* by low water or other causes of delay, as was the case of the logs cut in the state of Maine, the tax on which was abated by the Supreme Court of New Hampshire. Such goods are already in the course of commercial transportation and are clearly under the protection of the Constitution. And so, we think, would the goods in question be when actually started in the course of transportation to another state, or delivered to a carrier for such transportation. *There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the state of their origin to that of their destination.* When the products of the farm or forest are collected and brought in from the surrounding country to a town or station serving as an *entrepot* for that particular region, whether on a river or a line of railroad, such products are not yet exports nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination or have started on their ultimate passage to that state.

* * * * *

Although intended for exportation, they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion, for some place out of the state, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property within the state?

* * *

Such goods do not cease to be a part of the general mass of property within the state, subject, as such, to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another state, or have been started upon transportation in a continuous route or journey.

* * * * *

It is true it was said in the case of *The Daniel Ball*, 10 Wall., 565; 77 U. S., 19: 'Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. But this movement does not begin until the articles have been shipped or started for transportation from one state to another. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed or certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state. * * * Until shipped or started on its final journey out of the state its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing.' "

While the case just cited involved a question of liability for taxes imposed by the state in which the logs in question were at rest prior to their movement in interstate commerce, the principle of the control of the state over such property is applicable in the instant case, and as the question of the intent of the shipper is fully discussed and clearly defined it is particularly applicable herein. It will be noted in the opinion above quoted

that in referring to the movement the learned justice uses the word "final" and says:

> "There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the state of their origin to that of their destination."

And again, a little further on in the opinion the justice refers to that "final" movement as "when they have started on their ultimate passage to that state." This would mean that the goods have had a prior movement still within the control of the state, and that when that prior movement has ceased they have come to rest, still within the jurisdiction of the state, but when they have begun their ultimate movement then the control of the state is released and the control of the federal government begins. It can make no difference, as the justice in that case said, how the prior movement was accomplished, whether by river or by a line of railroad. It becomes interstate commerce only when the ultimate movement has begun in the passage of the goods from one state to their ultimate destination in another state.

So, this principle applies *conversely* to property shipped from a point without the state to a point within the state. When the property has arrived at its destination within the state and is delivered to the consignee, the interstate movement ceases and the federal government loses its control and the state's jurisdiction becomes supreme. The property then becomes taxable as a part of the general mass of the state's property.

Goods cease to constitute a part of interstate commerce and become a part of the general property of the

state, and amenable to its laws, when they are sent into the state either for the purpose of sale or in consequence of a sale. *Robbins* v. *Shelby County Taxing District* (*decided March* 7, 1887), 120 U. S. 489; 7 Sup. Ct. Rep., 592, 30 L. Ed., 694.

In the case of *James & Abbott* v. *The East Tennessee, Va. & Ga. R. Co.*, 3 I. C. C. Rep., 225, 2 I. C. Rep., 609 (*decided September* 25, 1889), the complaint was that a higher rate was charged from Johnson City, Tenn., to Boston than was charged from Atlanta, Ga., to the same point, although the route from Atlanta was through Johnson City and the distance greater. As an excuse the carrier alleged that the lumber (which was the merchandise in question), had been shipped into Atlanta from the various places where it was manufactured and had already paid one rate over the road of the initial carrier, and that for that reason if the owner elected to ship it to Boston it was taken on at a less rate than it otherwise would have been. It was held that the fact that it had been brought to Atlanta from some other point and there unloaded for the purpose of testing the market would not entitle it to a different rate when taken forward afterwards; that the new shipment was a new undertaking and that the rate upon this lumber must be the same as upon any and all other shipped from Atlanta.

Mr. Commissioner Morrison said (p. 234):

> "The origin of the goods, or the fact that lumber comes to their roads from the mill or over some other railroad or over a wagon road, is not an element which enters into the question of what they may reasonably demand for the transportation services they are to render. This equitable rule is not altered in the case under consideration by the statement of the traffic manager of one of the defendant companies who, as a witness, said: 'We

have already brought that lumber from the localities to Atlanta.' When freight is taken up at Macon or elsewhere and delivered at Atlanta for sale or other purpose not incident and necessary to through transportation, the shipment is complete, and when such freight is forwarded the carriage from Atlanta is a new undertaking. The character of a local shipment between the cities or between the mills and cities of Georgia is the same when made by the defendants or some one of them as if made by some other railroad company, and, whether made by one or the other, it cannot legally have the effect of raising or lowering the charges for transportation of the freight when reshipped."

In the case of *The Chicago, Rock Island & Pacific Ry. Co.* v. *The Chicago & Alton R. Co.*, 3 I. C. C. Rep., 450, 2 I. C. Rep., 721 (*decided February* 14, 1890), the Rock Island Company owned and operated a line of railroad extending from Chicago to Kansas City, and controlled and operated in connection with that line another line of railroad extending west from Kansas City. The road of the Chicago & Alton Company extended only between Kansas City and Chicago. The various roads to the west of Kansas City, including that controlled by the Chicago, Rock Island & Pacific, made rates upon live stock from various points west into Kansas City. The different lines between Chicago and Kansas City made rates upon live stock between those two points. The lines east and the lines west of Kansas City agreed upon through rates upon live stock from points west of Kansas City through Kansas City to Chicago which were less than the sum of the local rates, one of those lines being the Chicago, Rock Island & Pacific and its road west of Kansas City. It was the custom of this road to allow shippers of live stock to ship into Kansas City, unload there, try the market, and if the cattle were not sold within so many days (just how many the case does not show), then

reload and reship them to Chicago upon the balance of the through rate, treating the entire as one through shipment.

The Chicago, Rock Island & Pacific, desiring to control the traffic which it brought into Kansas City from the west between Kansas City and Chicago, refused to agree upon any joint division with the Chicago & Alton. Thereupon the latter company advertised that it would ship from Kansas City to Chicago at the balance of the through rate, so that the shipper who had brought his cattle to Kansas City and unloaded them there might, if he desired, send them forward to Chicago by its lines at exactly the same rate at which he could send them by the Rock Island line.

Thereupon, the Rock Island road filed a complaint with the Commission alleging that this practice upon the part of the Chicago & Alton was illegal, for the reason that it transported this live stock from Kansas City to Chicago at less rate than it transported live stock originating at Kansas City, although both shipments were strictly local. The Chicago & Alton replied that its practice was exactly the same as that of the petitioner, for that when the cattle were once unloaded at Kansas City if they were afterwards taken up by the Rock Island and sent forward to Chicago, that also was a local shipment.

The Commission did not decide whether this practice of protecting the through rate was legal or illegal, but it did decide that the shipment by the petitioner was no a through shipment. In disposing of the case, Mr. Chairman Cooley said (p. 725):

> "It is impossible to say upon the evidence in this case that when the complainant receives live cattle at points west of Kansas City, at through rates to Chicago, but *with an understanding that they are to*

be unloaded at Kansas City to try the market there, there is in point of fact a through shipment from the point of origin to Chicago. So far from that being the case *there is no understanding that there shall be any through shipment at all, and whether there shall be one or not is understood to depend entirely upon the state of market at Kansas City, and upon the option of the purchaser if the cattle are there sold.* If the cattle are finally transported to Chicago, there is not only more than the one loading and unloading, but there is also necessarily some loss of time beyond what would be expected to take place in case of a through shipment. The identity of the cattle may to some extent be changed, the original shipper may cease to have anything to do with the transportation of the freight at that point; and it is pure fiction that treats the transportation as one and indivisible from the point of origin to the point which finally, at the option of the parties, proves to be that of ultimate destination."

Later on this language is used (p. 725):

"The reshipment by the complainant under the circumstances attending its course of business from Kansas City to Chicago is no more a part of a through transportation than is a shipment of cattle brought into Kansas City from points to the west and taken thence by the respondent. The fiction that the case of reshipment is a part only of one transportation is just as applicable to the one case as to the other, and come just as near representing a fact."

In the case of *Cutting* v. *Florida Railway & Navigation Co. et al.* (*decided June* 26, 1891), 46 Fed. Rep., 641, the plaintiff and intervenors were large shippers of citrus fruit, from points mainly about Citra, Fla., to interstate points. Up to December 1st, 1888, shipments appeared to have been regularly made on through bills of lading, at the through rates established by the several lines respectively carrying the goods from Citra to interstate destinations. After December 1, 1888, in pursu-

ance of an arrangement among orange growers to that end, and with a view to characterize the shipments as local commerce entirely within the state, so as to claim for such shipments the rates given by the railway commission of the state of Florida, intervenors' consignments were made to an agent at Callahan, *although the ultimate destination of the fruit was not changed,* nor was the manner of transacting the business substantially changed from what it had been before December 1st. As before, the railroad furnished the cars to carry the fruit to its ultimate destination. At Callahan the goods were not unloaded, the bulk not broken, nor the cars delayed to any extent. As in the case of through shipments generally the loaded cars were at once transferred to other carriers, to be forwarded to their destination; in other words, the character of the shipment was not changed, but after December 1st, as before, the fruit, when loaded on cars at Citra, *was started for and destined to markets in other states, and then and there at Citra began what was in fact one continuous journey to an ultimate destination without the state of Florida.* The difference in the transportation of the business was solely in calling for a bill of lading which was local instead of calling for a through bill, the interposition of a forwarding agent, and in preparing the charges demanded under protest. *Held:* That the shipments were interstate commerce and subject to the established joint through rates from Citra, Fla., to their interstate destination.

The facts in this case are clearly distinguishable from the facts in the case at bar. In this case, although the bill of lading which was issued by the railroad company called for transportation from Citra, Fla., to Callahan, Fla., yet in fact, the real contract of transportation that

was entered into at Citra, Fla., by the common carrier and the shipper, was for the transportation of fruit to interstate points beyond Callahan, Fla. As prior to December 1st, 1888, the ultimate interstate destination was known to both parties. As a matter of fact, the railroad furnished the cars for through transportation from Citra, Fla., to their interstate destination, and when those cars left Citra they were started for and destined to markets in other states. There was no delivery taken at Callahan, Fla., either physical or constructive, and the only delay at that point was the delay such as is incident to the transfer of cars by the connecting carriers, the same as had existed prior to December 1st, 1888. Clearly the decision of the court is based upon the hypothesis that the contract for transportation that was entered into by the shipper and the carrier at Citra, Fla., was for the transportation of this fruit to points without the state of Florida, and the conduct of the parties in the treatment of this traffic clearly supports this inference. So that, the document that was handed to the shipper by the carrier at the point of origin of the traffic—the bill of lading reading from Citra, Fla., to Callahan, Fla.—did not voice the agreement of the parties and was not the true evidence of their contract.

If this reasoning is not correct, then there is but one other premise on which to proceed, and that is, that although this traffic which originated at Citra, Fla., as expressed by the bill of lading, would unquestionably have been treated as state traffic had delivery, either physical or constructive, been taken at Callahan, Fla., the fact that the carrier, with the acquiescence of the shipper, if not acting under positive instructions to that effect from the shipper, continued to transportation of this traffic beyond Callahan, Fla., to interstate points,

is evidence that the *parties changed their original contract of shipment and that their subsequent conduct amounted to a novation.*

Right at the present time, in many lines of business such as grain, cotton, cotton seed, fruits, vegetables, etc., a number of innovations are made in the original contract of shipment before delivery of the traffic is finally accepted, and no one would contend that the successive changes in the original contract amounted to separate and distinct movements subject to separate and distinct rates, instead of being subject to one rate from the point of origin of the traffic to the final destination where delivery is taken. As a matter of fact, it is usually the case in such classes of business, when the cars are shipped from points of origin that they have no definite consignee or destination. They are usually consigned to hypothetical destinations in the expectation of disposing of them at the most favorable market along the route *but at no such intermediate points is there, either physical or constructive, delivery taken and no freight charges are paid* until the actual destination is ascertained and reached. In the *Cutting* v. *Florida Railway & Navigation Co. case, supra,* if the innovation in the original contract of shipment was not effected by the active conduct of the parties, the innovation is certainly implied from the passiveness of the shipper in assenting to the cars being continued on their journey to interstate points beyond Callahan without any interruption to the transportation.

In the Matter of Alleged Unlawful Rates and Practices in the Transportation of Grain and Grain Products by A. T. & S. F. Ry. (*decided June 29th,* 1897), 7. I. C. C. Rep., 240, shipments of grain were carried to Kansas City, Mo., from points west thereof at local rates, and quantities of grain were afterwards reshipped and re-

billed from Kansas City to Chicago or other destinations at the balance of the established through rate from the original point of shipment to Chicago or other ultimate destination instead of the higher local rate in force from Kansas City to such destination. There was no agreement for through carriage between the shipper and the carrier at the original point of shipment, no other destination than Kansas City was named, and upon carriage of the grain to that point and delivery to consignee the transportation was completed and the local rate in effect to Kansas City was paid; but the practice was to allow the consignee or other owner of grain at Kansas City to ship from Kansas City to Chicago and other points at the "balance of the through rate," upon presentation of the paid expense bill to Kansas City and certification by a joint agent of carriers at Kansas City. Under this "expense bill" practice it was practicable, through transfers of expenss bills, to secure a lower "balance of through rate" than would result from deducting the local rate between the actual point of origin and Kansas City from the through rate between said point of origin and the final destination, and other rate manipulations were possible. *Held:* That such shipment and reshipment did not constitute a through shipment from the point of origin to the point of final destination, and grain so shipped and reshipped was not entitled to the benefit of the through rate in force. *Held, further:* That the shipment from the point of origin to Kansas City was local, resulting in the grain becoming Kansas City grain, and the fact that it had come from a point farther west was no reason for applying on shipments of such grain from Kansas City any less or different rate than was in force from Kansas Citv. (*Citing Chicago, R. I. & P. R. Co.* v. *Chicago & A. Rd. Co.*, 3 I. C. C. Rep., 450; 2 I. C. Rep., 721, and *James* v. *East Ten-*

nessee, Va. & Ga. Rd. Co., 2 I. C. Rep., 609; 3 I. C. C. Rep., 225.)

The determinative feature of a through shipment is an agreement between the parties at the inception of the carriage that the freight shall be transported to the point of destination. *Re Alleged Unlawful Rates and Practices of Kansas City, M. & B. Rd. Co.* (*decided March* 27, 1899), 8 I. C. C. Rep., 121.

What determines the point of destination if the bill of lading does not? Surely, the destination of an interstate shipment is not an indefinite, movable place subject to the whim of the carrier, but is a fixed, certain and definite point. And this is necessarily true in the proper application of interstate freight rates and in maintaining the integrity of such published rates. Interstate freight rates are published in printed tariffs which state between what points the rates apply, and are open to the public at large. The published rate applicable to interstate transportation between given points, so long as it remains uncancelled, is as fixed and unalterable, either by the shipper or by the carrier, as if that particular rate had been established by a special act of Congress. When regularly published, it is no longer the rate imposed by the carrier, but is the rate imposed by law. This being true, if the published freight rate is to be observed at all, or rather, if the law is to be obeyed, there must of necessity be some document which evidences in clear and unmistakable terms just what is the point of origin and the point of destination. And I dare say that this is the reason which prompted Congress to insert in Section 20 of the Act to Regulate Commerce, the following provision:

"That any common carrier, railroad or transportation company receiving property to be transport-

ed from a point in one state to a point in another state shall issue a receipt or bill of lading therefor." * * *

Again in Section 14 of the Act to Regulate Commerce (which was in effect at the time this cause of action arose), the following provision with respect to the right of the shipper to route his traffic is found:

> "In all cases where at the time of delivery of property to any railroad corporation being common carrier, for transportation subject to the provisions of this act to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this act provided to which through routes and through rates such carrier is a party, the person, firm or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and *issue a through bill of lading therefor as so directed,* and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading; *Provided, however,* That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported."

What is the object of these provisions if they are not for the purpose of protecting a shipper's right to transport his property as he pleases, and to whatever destina-

tion he chooses and be able to know in advance just what his freight rate will be. Could a railroad company refuse to receive lumber or other property for interstate transportation to Oakley, Ohio, on the theory that it *believes* that Oakley is not the final destination, and that it is the intent of the shipper or consignee to ultimately move the property to a point beyond Oakley after its receipt at that point. A published freight rate is open to all and every member of the shipping public without being subject to any restrictions other than those set forth in the published tariff containing the freight rate, and a common carrier could be compelled by writ of madamus to accept property for transportation to points to which it held itself out as a transporter, and to issue a receipt or bill of lading covering such transportation. Where under the interstate commerce law is the shipper denied the right to move lumber from interstate points to Oakley, Ohio? And where is there any limitation placed upon the right of the receiver of that lumber at Oakley, Ohio, to subsequently do with it as he pleases —move it to Chicago, Ill., Indianapolis, Ind., or Madisonville, Ohio? And if he choose to move the lumber from Oakley, Ohio, to Madisonville, Ohio, via the B. & O. S. W. Rd. Co., can that common carrier deny him that right on the assumption that the shipper knew at the time that the property was shipped, that it would ultimately be consumed at Madisonville, Ohio?

If the contention of the plaintiff is sound and could be carried to its logical conclusion, it would be possible for a railroad company to require a shipper who has received a carload quantity of goods at the carload rate and subsequently reshipped the contents of the car in small quantites to various destinations, to pay the less than carload rate on each small shipment from point of

origin to the final destination of such shipments. Nothing but confusion would follow such a course, and yet it would be just as logical as in the case at bar because in the case of forwarding agents handling consolidated carloads, the ultimate destinatoin of each piece of merchandise in the car is known at the time when the bill of lading is issued for the carload at the inception of the carriage. The United States Supreme Court in *Interstate Commerce Commission* v. *Delaware, L. & W. Rd. Co.* (April 3, 1911), 220 U. S. 235, 55 L. Ed., 448, 31 Sup. Ct. Rep., 392, held that a carrier may not forbid the aggegation of the shipments of various owners for the purpose of carload rating, or the combination of such shipments by forwarding agents for that purpose, where preferences and discriminations, forbidden by Section 2 of the act to regulate commerce, will result from the carrier's action; that a carrier may not, under the interstate commerce act, make the ownership of goods tendered to it for carriage the criterion by which its charge for such carriage is to be measured; that the ownership or non-oownership by the shipper of the goods tendered for carriage is not a dissimilar circumstance and condition, within the meaning of Section 2 of the act prohibiting inequality and discrimination in rates. The court, per Mr. Chief Justice White, said (p. 252):

> "The contetion that a carrier, when goods are tendered to him for transportation, can make the ownership of the goods the test of the duty to carry, or, what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods *is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers,* as to demonstrate the unsoundness of the proposition by its mere state-

ment. We say this because *it is impossible to conceive of any rational theory by which such a right could be justified consistently either with the duty of the carrier to transport or the right of a shipper to demand transportation.* This must be, since nothing in the duties of a common carrier by the remotest implication can be held to imply the power to sit in judgment on the title of the prospective shipper who has tendered goods for transportation. In fact, the want of foundation for the assertion of such a power is so obvious that in the argument at bar its existence is not directly contended for as an original proposition, but is deduced by implication from the supposed effect of some of the provisions of the second section of the act to regulate commerce. In substance, the contention is that, as the section forbids a carrier from charging 'a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property, * * * than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions' (24 Stat. at L., 379, chap. 104, U. S. Comp. Stat., 1901, p. 3154), authority is to be implied for basing a charge for transportation upon ownership or non-ownership of the goods tendered for carriage, upon the theory that such ownership or non-ownership is a dissimilar circumstance and condition within the meaning of the section.

But this argument, in every conceivable aspect, amounts only to saying that a provision of the statute which was plainly intended to prevent inequality and discrimination has resulted in bringing about such conditions."

This method of handling traffic is available to all shippers. Its use is optional with the shipper. This is also true as to the case at bar.

The Supreme Court in *Interstate Commerce Commission* v. *Delaware, L. & W. Rd. Co., supra,* sustained the order of the Interstate Commerce Commission in *Cali-*

fornia Commercial Association v. *Wells, Fargo & Company* (June 22, 1908), 14 I. C. C. Rep., 422, and the following extract from the opinion of the Commission, per Mr. Commissioner Lane, is significant to the case at bar (pp. 426, 427):

> "The fundamental and large question involved in this case is the right of a carrier to determine what shippers may use its published rates. It is the contention of the defendant that it may refuse to grant the bulk rate (which in this case is analogous to the carload rate made by a railroad) to any but single owners of such shipments; that to permit any other use of the rate would be to induce many shippers of small packages (less than carload shippers) to unite their shipments in order to secure the lower rate applicable to large shipments, and thus the forwarding agency would come in — to being — an agency which could cut the package rate, render such rates unstable, grant preferences, and effect discriminations contrary to the spirit of the act to regulate commerce. To protect themselves against the creation of such agencies the rule has been drafted which has been quoted above. The effect of such rule has been seen in this case—a group of smaller merchants are denied a rate which a larger merchant is given; they tender the same number of packages of the same weight, containing the same goods as the large department store which is their rival, and they are charged a rate 50 per cent higher upon their shipments. A rule which works such a result can not be based on solid principle, even though it may have most specious and persuasive reasons to support it.
>
> The express companies urge that unless such a rule is permitted, shippers will form such agencies and no one thenceforth will be able to tell what the real package or the less than carload rate is. The forwarding agency will give one rate, a second shipper another rate, a third another, and so the very purpose of the act, the uniformity of rates as between shippers, will be destroyed. We do not

know that this will be so, but it is theoretically possible. The one certain answer to this argument is that the carrier makes but one rate and applies it without favor to each shipment that is tendered—to the small shipment the rate applicable thereto, and to the larger shipment its own fixed rate. The railroad or the express company offers to the world to transport a certain quantity of a certain character of freight for a certain definite amount of money, and it has no fair concern with the profit of the shipper or his interest in the property. It may ask that the shipment shall be what it purports to be in character and in weight. for that affects the rate; it may make reasonable rules to protect itself against a multiplicity of claims for loss or damages, for such claims ultimately affect the rate at which the carrier can afford to carry; it may refuse to accept the shipment except upon payment of the charges—these and, no doubt, other rules are properly within the carrier's prerogative, but we look in vain for authority to justify a classification of freight according to ownership. If we may hold as reasonable such a rule by which the utility of a rate is limited upon the carrier's knowledge of the persons to whom freight is really destined, we should be ready likewise to approve a rule which makes the right to use a rate depend upon the carrier's knowledge of the use to which the article is to be put by the ultimate consignee—whether a certain shipment of grain, for instance, is to be ground into flour, sown in the field, fed to cattle or be converted into liquor. Where can we logically stop if we depart from the simple tests which may be put by the carrier's agent at the time of shipment: (a) Who offers this shipment? (b) Of what does it consist? (c) To whom, and where, is it bound? For its purpose as a common carrier the railroad or the express company needs no other information than may properly be elicted by these questions, and it would appear improper and unreasonable that it should be permitted to go into the vague and illimitable realms outside of and beyond such needs. The carrier deals with the shipment that is tendered, not with its ownership nor

with its ultimate use; and it deals with the shipper who tenders it, not with the owner of the property or the last and most remote person to whom it is distributed. To veer from this straight course, no matter to how slight a degree or for what apparently beneficial purpose, is to lead away from the policy of the law which condemns discriminations and preferences."

The gist of the Commission's holding is, that the railroad can not look beyond the physical incidents of the transportation and refuse for that reason to apply its published tariff; that the rate having been named was open to every member of the public who brought himself within its provisions. A common carrier's duly published tariff sets forth the limitation of its rights and duties with reference to the shipping public and its published rate can not lawfully be deviated from.

"When schedules are once filed with the Commission, with its consent, and posted for the purpose of notice to all shippers, as required by the act, they may not in any respect be changed, altered, or modified, except in the act. Until so changed, every shipper delivers his goods for transportation to the carrier, subject to the terms imposed by such schedules, and until so changed, the carrier is under *a contractual obligation* to abide thereby. Such is the express mandate of the third paragraph of Section 6, * * * (*Circuit Court of Appeals, American Sugar Refining Company* v. *Delaware, L. & W. Rd. Co.*, 207 Fed. Rep., 733, 125 C. C. A., 251, decided August 19th, 1913.)

A carrier's lawfully published tariff is a standing offer to the public at large that it will receive and transport goods between the points named therein and at the rates named therein and when a shipper delivers goods to the carrier and receives a bill of lading therefor, there is a contract subsisting between those parties; the bill of lading furnished the shipping directions, *i. e.*, the names of the shipper and consignee, the character of

the goods, and the points of origin and destination, and the published tariff rate for transportation between the points named in the bill of lading is then read into the contract by operation of law. When that contract is fully performed by both shipper and carrier the transaction is closed and any subsequent conduct with reference to those same goods is the subject-matter of a new and independent contract.

The defendants based the sale price of their goods upon the published tariff rates (the Oakley combination) and if the suit of the plaintiff is sustained it will result in giving judicial sanction to the very character of discrimination which the act to regulate commerce was designed to prevent, and the defendants will sustain a severe loss.

Surely, it is not the duty of a shipper to inquire into the motives which prompts carriers in maintaining a rate-situation such as is presented in the case at bar, and the very fact that the joint through rate to Madisonville exceeded the Oakley combination, is the best evidence of the unreasonableness of the joint through rate. If the tariff naming the factor from Oakley to Madisonville had been filed with the Interstate Commerce Commission and therefore available in constructing a through interstate rate, the higher joint through rate to Madisonville would have been unlawful and void under the aggregate-of-intermediate-rates rule of the fourth section of the act. It is the plain duty of carriers to establish and maintain just and reasonable rates and it is inconceivable that a shipper should be denied the right to have his goods transported at the lowest charge under lawfully available rates.

When the traffic arrived at Oakley, Ohio, and the charges were paid, and the property delivered into the

possession of the consignee, either physically or constructively, the interstate transportation was at an end, and the interstate contract was fully performed by both the carrier and the shipper, and the property became state property.

That there was a delivery of the goods is plainly admitted by the plaintiff in its petition wherein it alleges that it made a terminal trackage charge of $2 per car for making the delivery on the public team track at Oakley and that said delivery charge was paid by the defendants. The plaintiff apparently thinks that it should now be permitted to annul these executed transactions by simply giving the defendants credit in their supposed undercharge account for the delivery charges so paid.

In the case of *Hope Cotton Oil Co.* v. *Texas & P. Ry. Co.* (*decided April* 24, 1905), 10 I. C. C. Rep., 696, complainant desired to ship cotton seed in carloads from Louisiana stations on defendant's line to Hope, Ark., at the sum of local rates based upon Texarkana, Ark., which sum was less than the published through rate, but defendant refused to apply its local rate to Texarkana, which was 12.5 cents per cwt., on such through shipments, and also refused to allow complainant to ship locally to Texarkana under the 12.5 cent rate in force to that point. *Held*: That while defendant was entitled to insist upon the application of the through rate to the through shipment to Hope, it could not lawfully refuse to receive and carry complainant's freight to Texarkana under its local rate to that point and that the complaint is entitled to reparation for damages resulting from its inability to ship 640 tons of cotton seed to Hope which it had contracted for and desired to have transported over defendant's line.

In the case of *Porter* v. *St. Louis S. W. Ry. Co.* (*decided March* 17, 1906), 78 Ark., 182; 95 S. W., 453, the Supreme Court of Arkansas held that, although the through rate on freight from a point without the state to a point within the state is greater than the rate to an intermediate point, plus the local rate to the destination of the freight, a shipper can not take advantage of this fact in regard to a consignment which is in fact intended to be a continuous interstate shipment, but which is interrupted inside the state for the sole purpose of evading the interstate rate. The answer to the doctrine enunciated in this decision (*Porter* v. *St. L. S. W. Ry. Co.*, 78 Ark., 182), is:

The *Porter case* was decided on March 17, 1906, while the case of *Gulf, Colorado & Santa Fe Ry. Co.* v. *Texas*, 204 U. S., 403, 51 L. Ed., 540, 27 Sup. Ct., p. 360, was decided, February 25, 1907. Where the decision of a state supreme court is directly at variance with a decision of the Supreme Court of the United States, in cases involving the same facts and the same questions of law, there can be no doubt that the rule of law announced by the highest court must prevail. The *Goldthwaite case*, therefore, overrules the *Porter case*, and the latter no longer possesses any efficacy. The *Porter case* is also overruled by *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Iowa*, 233 U. S. 334, 59 L. Ed., 988, 34 Sup. Ct., p. 592 (*decided April* 13, 1914).

See case of *United States* v. *Geddes* (1904) C. C. of A., Sixth Circuit, 131 Fed. Rp., 452, 65 C. C. A. 320, involving Ohio River & Western Ry. Co., under the Safety Appliance Laws.

In *McNeill* v. *Southern Ry. Co.*, 202 U. S., 543, 26 Sup. Ct. Rep., 722, 50 L. Ed., 1142 (*decided May* 28, 1906), the gist of the decision was that "Property shipped

from a point in one state to a point in another state retains the character of interstate commerce until it is actually delivered to the consignee, and that an order of the state authorities commanding the carrier to place the cars containing such property on the private siding of the consignee for unloading, is void as an interference with the authority vested in the Interstate Commerce Commission by the Act to Regulate Commerce." The converse of this proposition is also true in that the Interstate Commerce Commission would have absolutely no jurisdiction over the case at bar, inasmuch as the property was actually delivered to the consignee and the interstate transportation was completed, and therefore, the property lost its character as interstate commerce and became subject to local control.

In *Gulf, Colorado & Santa Fe Ry. Co.* v. *Texas* (Goldthwaite case) 204 U. S., 403, 51 L. Ed., 540, 27 Sup. Ct., p., 360 (*decided February* 25, 1907), it was held that the intention or purpose of the owners of an interstate shipment of a carload of grain to forward such car from the original terminal point to another point in the same state does not make the shipment between such points, when performed by a connecting carrier to which the car was delivered by the original terminal carrier in obedience to the instructions of the owners, an interstate one, and, as such, exempt from the regulations of the state railroad commission.

In that case, however, the prior movement was also an interstate movement, but as the goods had come to rest within the state and the contract of transportation terminated, they were then within the control of the state of their destination, and a subsequent movement within that state was under the control and direction of that state. Therefor, the rate prescribed by the state of

Texas controlled the movement from Texarkana to Goldthwaite. The intent of the shipper in that case and in the instant case was to have the goods transported from the initial point to the ultimate point of destination. But that the ownership of the goods was a mere incident and not a determining circumstance in the case is shown by the following extract from Mr. Justice Brewer's opinion (p. 412):

> "*It is undoubtedly true that the character of a shipment, whether local or interstate, is not changed by a transfer of title during the transportation.* But whether it be one or the other may depend on the contract of shipment. The rights and obligations of carriers and shippers are reciprocal. The first contract of shipment in this case was from Hudson to Texarkana. During that transportation a contract was made at Kansas City for the sale of the corn, but that did not affect the character of the shipment from Hudson to Texarkana. It was an interstate shipment after the contract of sale as well as before. In other words, the transportation which was contracted for, and which was not changed by any act of the parties, was transportation of the corn from Hudson to Texarkana—that is, an interstate shipment. *The control over goods in process of transportation which may repeatedly change by sales, is one thing; the transportation is another thing, and follows the contract of shipment until that is changed by the agreement of owner and carrier.* Neither the Harroun nor the Hardin Company changed or offered to change the contract of shipment or the place of delivery."

The rights and liabilities of the shipper and carrier, respectively, as to the rate is governed by the carrier's published tariff which is available to all the world. The original contract of shipment must be changed by mutual assent of the parties thereto. In the case at bar there was a new bill of lading and contract of shipment entered into by a different carrier and a different shipper from the parties to the original contract.

In the case of *Morgan* v. *Missouri K. & T. Ry. Co.*, 12 I. C. C. Rep., 526 (*decided December* 6, 1907), the Interstate Commerce Commission held, that while a shipper may consign a shipment to a given point, pay the charges on the same, assume custody and take possession of the property, and, later reship it to another point under rates lawfully applicable to such reshipment, neither the carrier nor an agent of the carrier may act as the forwarding or reconsigning agent of the shipper in such a manner as to evade, or defeat the terms or intent or purpose of the law. This is sound doctrine and is in accordance with Section 7 of the Act to Regulate Commerce, which reads as follows:

> "That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act."

It will be noted that this provision of the act speaks of the continuous carriage from the place of shipment to the place of destination. When this provision is construed in connection with the other provisions of the Act to Regulate Commerce above set forth, having reference to the issuance of bills of lading, it is evident that the place of shipment and the place of destination spoken of are the ones set forth in the bills of lading,

and, of course, it would not be lawful for the carrier to assist the shipper in defeating the published rate properly applicable from the point of origin to destination as set forth in the bill of lading.

This means that the carrier and shipper may not connive to defeat the lawfully published rate applicable to an interstate shipment *between the points specified in the bill of lading.*

In *Interstate Commerce Commission Conference Rulings* 24, 98, 337, 365, 428 and 443, there was a device in each case existing between the carrier and the shipper to defeat the through rate applicable from the point of origin to destination. The carrier's agent was acting as the agent of the shipper for the purpose of rebilling, or in other words, the shipper's forwarding agent for the purpose of defeating the through rate. The Commission in one of these cases held, that such an arrangement is clearly in violation of the Interstate Commerce law. However, Section 7 of the act and the Conference Rulings of the Commission, above quoted, have no application to the case at bar, neither the railroad company nor its agent having acted as the agent of the shipper to defeat the published through rate from the point of origin to Oakley, Ohio, as set forth in the bill of lading, the movement from the point of origin to Oakley, Ohio, was a *bona fide* one which the shipper had a right to enjoy, the same as any other member of the shipping public, under lawfully published rates applicable thereto.

In the case of *General Oil Company* v. *Crain, Inspector of Coal Oil,* 209 U. S. 211, 28 Sup. Ct. Rep., 475, 52 L. Ed., 754 (*decided March* 23, 1908), the Supreme Court held:

"That oil shipped from Pennsylvania and Ohio,

and destined ultimately for points in Arkansas, Louisiana and Mississippi, is not property in interstate commerce, so as to exempt from state tax or inspection laws while it is held at a distributing point maintained by the shipper in Tennessee, at which point such oil is unloaded from tank cars into various tanks, barrels and other receptacles, and from which it is forwarded to its final destination."

In this case, Mr. Justice McKenna said:

"The beginning and the ending of the transit which constitute interstate commerce are easy to mark. The first is defined in *Coe* v. *Errol*, 116 U. S., 517, 29 L. Ed., 715, 6 Sup. Ct. Rep., 475, to be the point of time that an article is committed to a carrier for transportation to the state of its destination, or started on its ultimate passage. The latter is defined to be, in *Brown* v. *Houston*, 114 U. S., 622, 29 L. Ed., 257, 5 Sup. Ct. Rep., 1091, the point of time at which it arrives at its destination."

In the case of *West Texas Fuel Company* v. *Texas & P. Ry. Co.* (*decided March* 1, 1909), 15 I. C. C. Rep., 443, there was no independent contract for a separate or intrastate movement, and the decision in that case can clearly have no application to the case at bar because the facts are different.

In the case of *Marble Falls Insulator Pin Co.* v *Houston & Texas Central R. R. Co.*, 15 I. C. C. Rep., 167 (*decided February* 1, 1909), the facts were: Complainant delivered to the Houston & T. C. R. R. Co., at Marble Falls, Tex., a carload of cedar insulator pins, billed to St. Louis, Mo., without routing instructions. The car moved by way of initial carrier through McNeil, Tex., to Denison, Tex., whence it was forwarded to destination by the Missouri, K. & T. Ry. Complainant was charged a through rate of 46 cents per hundred pounds, which it complained of as excessive for the reason that inasmuch as no routing instructions were given it was the

carrier's duty to forward the shipment via the cheapest route, which was alleged to be via its own lines to McNeil, Tex., and thence via the International & Gt. N. R. and its connections to St. Louis, Mo. The pertinent part of the opinion of the Commission in that case is as follows:

> "If the shipper had billed the car to McNeil, Tex., and had received the same at that point, paying the charges then accrued, a local rate of 12 cents per 100 pounds under the tariff of the railroad commission of Texas, Class Rate No. 3 would have applied, and if complainant had re-shipped said carload to destination via the International & Great Northern Railroad, then a commodity rate of 23 cents per 100 pounds would have applied in accordance with L. & G. N. R. Tariff I. C. C. No. 257. * * * Under the decision of the Supreme Court in the case of *Gulf, Colorado & S. F. Ry. Co.* v. *Texas,* 204 U. S., 403, the latter method was the only one by which the shipper could have availed itself of the intra and interstate rates of the carriers resulting in an aggregate of rates equal to 35 cents per 100 pounds."

This is again pointed out in *Advance Thresher Co.* v. *Orange & N. W. R. R. Co.,* 15 I. C. C. Rep., 599, 601 (*decided April* 5, 1909), wherein the Commission said:

> "Although one of the factors in the combination on Orange was not on file with this Commission, and hence was not lawfully applicable on interstate shipments, it was a combination of locals which could have been used if the transportation wholly within the state of Texas had been separated from the transportation from Orange, Tex., to Crowley, La. In other words, under the decision in *Gulf, Colorado & Santa Fe* v. *Texas,* 204 U. S., 403, the complainant could, by taking possession of his shipment at Orange, have reshipped it to Crowley, under a combination of rates aggregating 32 cents."

In *Wood Butter Co.* v. *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* (*decided June* 8, 1909), 16 I. C. C.

Rep., 374, 375, citing *Morgan et al* v. *Missouri, K. & T. Ry. et al,* 12 I. C. C. Rep., 525, 528, the Interstate Commerce Commission said:

> "It is well settled that shipper has the right to consign a shipment to a given point, pay charges upon it, assume custody and take possession of the property, and later reship it to another point under rates lawfully applicable to such shipment."

There is quite an extended statement on this subject in *Kurtz* v. *Pennsylvania Co.,* 16 I. C. C. Rep., 410, 413 (*decided June* 8, 1909). It is so pertinent that we quote the statement *in extenso*:

> "Let us assume, now, that the through rate from Charleston to Savanah established by the Atlantic Coast Line was $6, while the rate from Charleston to the state line was $3, and from the state line to Savannah $2. It is apparent that if a passenger applied to the railroad company at Charleston for a ticket to Savannah, that company must sell him a ticket for $6, and would have no right to sell him two local tickets for $5, for that would be an evasion of its published tariff rates. Upon the other hand, this Commission has stated in its administrative rulings, and now repeats, that the passenger may properly pay his fare from Charleston to the state line and again from the state line to Savannah, although he thereby obtains through transportation between these points for less than the published through rate, and although he does so, knowing that he is going from Charleston to Savannah, and deliberately seeking this means of obtaining transportation at less than the through rate. *The reason for this is, that not the intent of the parties, but the actual transportation must be regarded as was held by the United States Supreme Court in Gulf, Colorado & Santa Fe Ry.* v. *Texas,* 204 U. S., 403, involving the transportation of a carload of grain from a point in North Dakota to a point in Texas, at a rate from the point of origin to Texarkana and a rate from Texarkana to destination, which, when combined, were less than the

through rate, The Charleston & Savannah Railroad Company sells to all the world tickets from Charleston to the state line for $3, and again from the state line to Savannah for $2. A passenger may purchase his ticket to the state line, and when he arrives there that contract of transportation is at an end. He now purchases another ticket from the state line to Savannah and a new contract of transportation begins. If the regulations of the railroad company permit it, he may, instead of purchasing a ticket, pay his cash fare upon the train, to the same effect. He has, indeed, secured through transportation for less than the through rate, but he has done so by putting together two local transportations at the local rates. Congress might undoubtedly say that this shall not be done, but up to the present time has not so declared."

A similar decision was made in the following cases:

Acme Cement Plaster Co. v. *Chicago & A. Rd. Co.* (*decided November* 24, 1909), 17 I. C. C. Rep., 220.

Awbrey & Semple v. *Galveston, H. & S. A. Ry. Co.* (*decided November* 26, 1909), 17 I. C. C. Rep., 267.

Dobbs v. *Louisville & N. Rd. Co.* (*decided April* 11, 1910), 18 I. C. C. Rep., 210.

In *Central Lumber Co.* v. *Chicago, M. & St. P. Ry. Co.*, 18 I. C. C. Rep., 495 (*decided May* 25, 1910), the complainant moved four carloads of lumber from points of origin in the state of Washington to themselves at Aberdeen, S. D. There was no indication on the billing that the lumber was intended subsequently to be reshipped from Aberdeen to points beyond. However, the complainant specifically stated that the lumber had been purchased for the purpose of stocking a lumber yard which it purposed to establish at Scranton, S. D., as soon as that road, then in the process of construction, was open for traffic at Scranton. As fast as the lumber was received at Aberdeen, the charges were paid thereon, the

same was unloading from the cars and deposited at a point adjacent to the tracks of the defendant. When the Puget Sound line of the defendant was open at Scranton, the lumber was reloaded in accordance with the shipper's original intention and forwarded to that point. Upon application of the complainant to the Interstate Commerce Commission to protect the joint through rate from points of origin to Scranton, S. D., instead of permitting the defendant to assess the combination of rates on Aberdeen, the commission held that that movement was a local movement and subject to the combination of local rates on Aberdeen. It will be seen that in that case the Commission entirely disregarded what was the intention of the shipper with respect to the traffic, and entirely relied upon the terms of the contract of transportation, or rather it relied upon what was actually done.

In *Oregon Railroad & Navigation Company* v. *Campbell, decided by the Circuit Court for the District of Oregon on July* 11, 1910, 180 Fed. Rep., 253, it was held that where merchandise was transported in interstate commerce to its destination in Oregon, where it was received by the consignee, placed in a warehouse, and freight paid, the interstate character of the shipment thereupon terminated, and the subsequent transportation of the goods in the original packages to other points in Oregon by the consignee constituted intrastate traffic, for which the carrier was only entitled to charge state rates provided by the state board of railroad commissioners.

In *Reduced Rates on Returned Shipments,* 19 I. C. C. Rep., page 417 (*decided October* 10, 1910), the Commission said:

"Transit arrangements in their most common

form at least, are susceptible of defense only upon the theory that the inbound and outbound movements are in fact part of a single continuous transaction. While the freight is delayed at the transit point the shipment is merely suspended temporarily, the present intention of the shipper being to forward the goods to their ultimate destination. *Once let it be conceded that the inbound and outbound movements are separate and distinct and the impropriety of applying any rates other than the regularly established locals would be self-evident. G. C. & S. F. Ry. Co.* v. *Texas,* 204 U. S., 403."

This latter quotaton with reference to the *Gulf, Colorado & Santa Fe case* is again made by the Interstate Commerce Commission in *Red River Oil Co.* v. *Texas & P. Ry. Co.,* 23 I. C. C. Rep. 446 (*decided May* 13, 1912).

In the case of *Wells-Higman Co.* v. *Grand Rapids & Indiana Ry. Co. et al.,* 19 I. C. C. Rep., 487 (*decided November* 7, 1910), the facts were: That complainant, who was engaged in the manufacture of fruit baskets, made shipment of a carload of grape baskets from Metropolis, Ill., to itself at Chicago, Ill., "care Pere Marquette Ry. at Riverdale, Ill." Before the arrival of the car at Riverdale, complainant instructed the Pere Marquette to forward it to C. W. Harper, Lawton, Mich. The initial carrier was the Illinois Central R. R., which hauled the car to Riverdale and there delivered it to the Pere Marquette Ry., which carrier advanced to the Illinois Central its charges for the haul performed and rebilled the car to Lawton, via its own line, Hartford, Mich., and the Kalamazoo L. S. & C. R. R. At Lawton charges amounting to $76.94 were assessed, made up of $43.40 to Chicago at a rate of 19.5c, and $33.45 from Riverdale to Lawton at a rate of 15c. Complainant alleged said charges to be unreasonable and excessive, claiming that the lawful rate from Metropolis to Chicago was 10 cents, and 10 cents from Chicago to Lawton,

on which basis the proper charges would have been $54, or an overcharge of $22.94, for which the complainant asked reparation. The Commision held: That this involved two separate and distinct movements, an intrastate movement from Metropolis, Ill., to Chicago, Ill., and an interstate movement from Chicago, Ill., to Lawton, Mich.; and that the Commission had no jurisdiction over the intrastate rate. In the opinion, at page 489, the Commission said:

> "By the terms of the bill of lading issued by the defendant the Illinois Central R. R., only a movement from Metropolis, Ill., to Chicago, Ill., was contracted for, and there was nothing to indicate that the shipment would ultimately find its way outside the state. Complainant's instructions to send the car to Lawton were not given to the Illinois Central, which performed the haul to Chicago, but were given to the Pere Marquette, which had nothing whatever to do with the haul to Chicago. The Pere Marquette advanced the Illinois Central the latter's charges for the service performed and then rebilled the shipment to Lawton. The contract entered into with the Illinois Central for the intrastate transportation to Chicago care of Pere Marquette at Riverdale, was duly discharged before the interstate movement to Lawton commenced." (Quoting *Gulf, C. & S. F. Ry. Co.* v. *Texas,* 204 U. S., 403; also *Coe* v. *Errol,* 116 U. S., 525.)

In the case of *Southern Pacific Terminal Co.* v. *I. C. C.* (*decided February* 20, 1911), 219 U. S., 498, 527, 31 Sup. Ct. Rep., 279, 55 L. Ed., 310, the court stated that the facts in that case were different from the facts in the case of *Gulf, C. & S. F. Co.* v. *Texas, supra,* and therefore the latter was not apposite. The shipments involved in the *Southern Pacific Terminal case* were cotton seed cake and meal purchased in Texas, Oklahoma, Louisiana and Arkansas, but chiefly in Texas, and shipped to Galveston on bills of lading and waybills

showing the point of origin in the state and the destination at Galveston. When the cake reached Galveston it was ground into meal and sacked, and, for the meal thus ground and such meal as had been brought to Galveston already ground, ship's bills of lading were taken to shipper's orders. The Supreme Court held:

> "Goods actually destined for export are necessarily in interstate as well as in foreign commerce when they actually start in the course of transportation to another state, or are delivered to a carrier for transportation; this is the same whether the goods are shipped on through bills of lading or on an initial bill only to the terminal within the same state where they are to be delivered to a carrier for foreign destination."

In the course of the opinion, Mr. Justice McKenna said:

> "The evidence establishes, appellants contend, that the transit of the cake and meal is absolutely ended at the leased premises at Galveston and that it is a final point of concentration and manufactured, the cotton-seed cake being there manufactured into meal and sacked for export. But this does not distinguish between the meal and the cake nor between the meal that is purchased at points outside of Texas and directly exported, from that so manufactured on the wharves of the Terminal Company. Nor does it take account of the fact that the wharves were intended for shipping facilities and a means of transition from land carriage to water carriage."

In *Big Canon Ranch Co.* v. *Galveston, H. & S. A. Ry.*, 20 I. C. C. Rep., 523 (*decided April* 4, 1911), complainants argue that, it having been the intention, so understood by the agent of the initial defendant, to make a through shipment to Soldani, that application of a combination of intermediate rates on stock sheep higher than that on stock cattle, resulted in the exaction of an unreasonable charge. Defendants maintained that the trans-

portation from Sanderson and Dryden to Fort Worth was intrastate and not within the jurisdiction of this commission and that the separately established rates were just and reasonable.

> "The facts disclosed by the record bring this case clearly within the rule announced by the Supreme Court of the United States in *G. C. & S. F. Ry. Co.* v. *Texas*, 204 U. S. 403. As noted, the freight charges up to Fort Worth were paid at that point, the property was delivered into the possession of the shipper, and a new contract with another carrier for transportation of the sheep to Soldani was executed. *Although it was undoubtedly the intention of the shipper to forward the sheep from the point of origin to Soldani*, in the case above cited the court held that *the intention of the shipper is immaterial, and that the question whether a particular shipment is subject to state or federal laws must be determined by examination of the contract of transportation.* In the present case, the Galveston, Harrisburg & San Antonio Ry. Co. and the Missouri, Kansas & Texas Railway Company were under no obligation, nor had they any right to transport or forward the shipments beyond Fort Worth. Upon delivery at that point the transportation required by the shipper was completed. It follows that the first movement and charges therefor were not subject to the act to regulate commerce or the jurisdiction of this commission."

In the *Arkansas Rate cases* (*St. Louis, S. W. Ry. Co.* v. *Allen*), 187 Fed. Rep., 294, at page 296 (*decided May* 3, 1911), the court said:

> "Nor does the intention of the shipper or passenger to avoid the higher interstate rates by the purchase of tickets or shipments, at the lower intrastate rates, change the rule of the law." This doctrine is also settled in the case of *Gulf, Colorado & Santa Fe* v. *Texas, supra.* (This case reversed, but not on this proposition, 230 U. S. 553, 57 L. Ed. 165, 33 Sup. Ct. Rep. 1030.)

In *Railroad Commissioners of Ohio* v. *Worthington*, 225 U. S., 109, 56 L. Ed., 1004, 32 Sup. Ct. Rep., 653 (*decided May* 27, 1912), the United States Supreme Court held:

> "A rate fixed by the Ohio Railroad Commission for coal from state points to 'on board' vessels at Port Huron, Ohio, and intended for shipment to some point beyond the state, undetermined at the time of shipment and for convenience billed to the shipper's own order at Huron, held to be a rate affecting interstate shipment and void under the Commerce Clause of the Constitution as an attempt to regulate interstate commerce."

The rate established by the Ohio Railroad Commission covered, in addition to rail transportation, the service of unloading the coal from the cars into the vessels and trimming it in the holds of the vessels, so that it might safely proceed. Speaking of the Texarkana case, Mr. Justice Day said:

> "Much stress is laid in argument for the Ohio Commission upon the fact that the coal is billed only to Huron, and it is said that in that aspect of the case it it controlled by *G. C. & S. F. Ry. Co.* v. *Texas*, 204 U. S., 403. There it was sought to hold a railway company upon a shipment of corn from Texarkana to Goldthwaite, Texas, for a violation of the regulations of the said Railroad Commission applicable to intrastate carriers. The company contended that in fact the shipment was an intrastate carriage from Hudson, S. D., to Goldthwaite, Texas. The facts showed that the corn was carried upon a bill of lading from Hudson to Texarkana, and that afterwards, some five days later, it was shipped from Texarkana to Goldthwaite, both points in the state of Texas. This was held to be an intrastate shipment *unaffected by the fact that the shipper intended to reship the corn from Texarkana to Goldthwaite*, for as this court has held, the corn had been shipped to Texarkana upon a contract for interstate shipment, and the reshipment five days later upon a

> new contract, was an independent intrastate shipment. It is evident from this statement of facts that the case is quite different from the one under consideration. There a new and independent contract for intrastate shipment was made, the interstate transportation having been completely performed; here a rate is fixed on that part of an interstate carriage which includes the actual placing of the coal into vessels ready to be carried beyond the state destination."

By the very terms of the service which the W. & L. E. Rd. Co. contracted to perform, it was required to deliver the coal into the vessels provided to receive it and to load the vesels with the coal properly distributed in their holds and the cargo trimmed for its further transportation to the ports of other states. (187 Fed. Rep. 965; 110 C. C. A. 85.)

A mere reading of the decision in the *Worthington case* must be convincing to any layman as well as to any lawyer, that the Texarkana case did not control the Worthington case. So, in the case before this honorable court, following the language of the Supreme Court of the United States in the *Texarkana* case, the lumber was shipped from southern points to Oakley, Ohio, upon contracts for interstate shipments and its reshipments several days later to local Ohio points upon new contracts, were independent intrastate movements. The court is asked to note the striking similarity between the *Texarkana* case and the case at bar.

In the Matter of Transportation by the Chesapeake & Ohio Railway Company et al. (*decided June* 12, 1911), 21 I. C. C. Rep., 207, the Interstate Commerce Commission held that:

> "There is no arrangement for continuous carriage or shipment from one state to another between a carrier by railroad and a carrier by water not subject to this act, when shipments by railroad, entirely

within one state, are consigned to care of a carrier by water which acts as agent of the consignee at a part in that state and the carrier by water transports said consignments to a point in another state, such ultimate destination not appearing in the rail carrier's bill of lading.

The evidence discloses a local intrastate shipment by railroad under one bill of lading upon which the purely local rate should be applied and an interstate shipment by a water carrier upon another bill of lading, such water carrier being under no common control, management, or arrangement with the railroad. Upon such a state of facts it is not necessary to elaborate. The Supreme Court in *G. C. & S. F. Ry. Co.* v. *Texas*, 204 U. S., 403, said:

'In many cases it would work the grossest injustice to a carrier if it could not rely on the contract of a shipment it has made, know whether it was bound to obey the state or federal law, or, obeying the former, find itself mulcted in penalties for not obeying the law of the other jurisdiction, simply because the shipper intended a transportation beyond that specified in the contract. It must be remembered that there is no presumption that a transportation when commenced is to be continued beyond the state limits and *the carrier ought to be able to depend upon the contract which it has made and must conform to the liability imposed by that contract.*''

In *Johnson* v. *Minneapolis, St. P. & St. Ste. M. Ry. Co.*, 2 I. C. C. Rep., 255 (*decided January* 8, 1912), the complainant shipped two carloads of lumber from Ingram, Wis., to Stevens Point, Wis., which was stopped off at the latter point for dressing, and then reshipped to points in Illinois. Neither the tariff naming the rate charged for the movement from Ingram to Stevens Point, nor the tariff naming the through rate from Ingram to Chicago stated that transit privileges would be allowed at Stevens Point. The bills of lading for the transportation from Ingram did not indicate that the shipments were to move to points outside of Wisconsin. *Held:*

''The transportation service called for by the bills

> of lading was wholly completed when the cars were delivered at Stevens Point, and the shipment of the dressed lumber from that point constituted a new transaction, which, under the tariffs in force, could have no relation to or effect upon the movement into Stevens Point or the rates charged therefor. It follows that the rate complained of in this petition was for a service performed wholly within the state of Wisconsin, and therefore is not within the jurisdiction of this commission. Complainant's remedy, if any, is by petition to the proper authority of the state of Wisconsin."

This decision is indicative of the proposition that the contract for transportation entered into by a shipper and a carrier controls, and the terms thereof cannont be arbitrarily changed by one of the parties thereto.

The *Texarkana case* was next referred to in *Texas & New Orleans R. R. Co.* v. *Sabine Tram Co.*, 227 U. S., 127, 33 Sup. Ct. Rep., 229, 57 L. Ed., 442 (*decided January* 27, 1913), and it seems to be the impression in some quarters that the *Sabine Tram Co. case* overruled the *Texarkana case*. But, in the former case, the Supreme Court held that shipments of lumber on local bills of lading from one point in the state to another point in the same state, destined from the beginning for export, under the circumstances of the case, were foreign and not intrastate commerce. In other words, merchandise destined for export acquires the character of interstate commerce as soon as actually started for its destination or delivered to a carrier for transportation. As the court said:

> "It is the nature of the traffic and not its accidents which determine whether it is intrastate or foreign."

Again:

> "Lumber ordered, manufactured and shipped for export through a port where there is no local trade,

held to be foreign and not intrastate commerce, although shipped on local bills of lading from a point in Texas to Sabine, Texas, and there shipped to its final destination by vessel not designated before arrival and after waiting full time allowed on the wharves before shipment."

Again:

"A continuous line of shipment through the same port to various foreign ports, of merchandise in which there is local trade, shows a continuity of transportation in which the delay and transshipment does not make any break that deprives it of its foreign character. In this case, held that shipments of lumber, although on local bills of lading, were foreign commerce and subject only to the rates established by the railroads and filed with the Interstate Commerce Commission."

In the *Sabine Tram Case* it was immaterial that there were two bills of lading—one covering the inland movement to the port and the other covering the ocean movement. They were both parts of one continuous movement in foreign commerce.

In the *Sabine Tram Co. case,* on page 127, Mr. Justice McKenna, speaking of the *Texarkana case,* said:

"*Gulf, C. & S. F. Ry. Co.* v. *Texas,* 204 U. S., 403, is urged as sustaining all the contentions of the Sabine Company, and the case was considered so apposite and controlling that the Supreme Court of the state rested its decision entirely upon it. It demands, therefore, a careful review."

The justice then proceeds to review the *Texarkana case,* and concludes his opinion with the statement that the facts in the Sabine Tram case are different. In view of this statement by the learned justice, the lawyers or laymen who contend that the *Sabine Tram Co.* case overruled the *Texarkana* case are entitled to all the comfort they can extract from a reading of Mr. Justice McKenna's opinion.

Export rates are not subject to the jurisdiction or control of the state. In the *Texarkana* case, the rate from Texarkana to Goldthwaite was held to be intrastate rate, under the jurisdiction of the Railroad Commission of Texas. The facts were, therefore, essentially different, and it was not necessary for the Supreme Court to overrule the *Texarkana case* in reaching the conclusions announced in the *Galveston* (*Young*) *case*, the *Worthington* (*Ohio*) *case*, the *Sabine Tram case, or the T. & P.* (*La.*) *case*. So the Supreme Court distinguished and differentiated the *Texarkana case*, but did not overrule it either expressly or impliedly.

In the case of *Bacon* v. *Illinois* (*February* 24, 1913), 227 U. S., 504, 57 L. Ed., 615, 33 Sup. Ct. Rep., 299, it was held that grain shipped from southern and western states under contracts for its transportation to eastern cities, but afterwards purchased while in transit by a resident of Illinois, with the intent to forward it promptly according to the shipping contract, after exercising the privilege reserved therein of removing it from the cars at Chicago for inspection, weighing, etc., may be assessed for local taxation while actually in his private grain elevator at Chicago, to which it had been removed for the aforesaid purposes.

In delivering the opinion of the court Mr. Justice Hughes said (p. 516):

> "But neither the fact that the grain had come from outside of the state, nor *the intention of the owner to send it to another state*, and there to dispose of it can be deemed controlling when the taxing power of the state of Illinois is concerned. The property was held by the plaintiff in error in Chicago for his own purposes and with *full power of disposition. It was not being actually transported, and it was not held by carrier for transportation. The plaintiff in error had withdrawn it from the car-*

rier. The purpose of the withdrawal did not alter the fact that it had ceased from being transported and had been placed in his hands. He had the privilege of continuing the transportation under the shipping contract, but of this he might avail himself or not, as he chose. He might sell the grain in Illinois or forward it, as he saw fit. It was in his possession, with the control of absolute ownership. He intended to forward the grain after it had been inspected, graded, etc., but this intention, while the grain remained in his keeping, and before it had been actually committed to the carrier for transportation, did not make it immune from local taxation. He had established a local facility in Chicago for his own benefit, and while, through its employment, the grain was at rest, there was no reason why it should not be included with his other property within the state in an assessment for taxation which was made in the usual way, without discrimination." (Citation of authorities.)

The *Texarkana* case was again referred to in the *Railroad Commissioners of Louisiana* v. *Texas & P. Ry. Co.* (*decided June* 10, 1913), 229 U. S., 340, 33 Sup. Ct. Rep., 837, 57 L. Ed., 1215. That case is clearly distinguishable from the case at bar as it was there held that shipments of freight under local bills of lading calling for transportation from interior points in Louisiana to New Orleans, La., and to be delivered to the shipper or consignee's order, but intended by the shipper to be exported to foreign countries, *and treated accordingly by both the shipper and the carrier, constituted foreign commerce.*

In *Arkansas Pass Channel & Dock Company* v. *Galveston, H. & S. A. Ry. Co.* (*decided June* 16, 1913), 27 I. C. C. Rep., 403, the Commission said:

> "It is the essential character of the commerce, not its mere incidents, that determine whether or not it is interstate.

This means essential character at the time of the in-

ception of the carriage. It is not practicable to revive completed and executed transactions by giving retroactive efficacy to subsequent conduct.

> "There must be transshipment at the seaboard, and if that may be made the point of ultimate destination by the device of separate bills of lading the commerce will be given local character, though it be essentially foreign. (*T. & N. O. R. R. Co.* v. *Sabine Tram Co.*, 227 U. S., 111, cited.)"

Again in the case of *Port Arthur Rice Milling Company* v. *Texas & Ft. S. Ry. Co.* (*decided December* 4, 1913), 28 I. C. C. Rep. 697, citing *Coe* v. *Errol, supra*, the Commission held:

> "The character of the commerce, not its mere accidents, must determine whether a shipment is local or foreign, but the mere intention of the shipper to export his traffic, unaccompanied by any circumstance or indication that the traffic is in fact for export, is not sufficient to stamp it as foreign commerce."

In the case of *Chicago, M. & St. P. Rd. Co.* v. *Iowa*, 223 U. S., 343, 34 Sup. Ct. Rep., 592, 58 L. Ed., 988 (*decided April* 13, 1914), the Supreme Court of the United States referred approvingly to the *Gulf, Colorado & Santa Fe case*, when Mr. Justice Hughes, as the organ of the court, said:

> "The fact that commodities received on interstate shipments are reshipped by the consignee in the cars in which they are received to other points of destination, does not necessarily establish the continuity of movement or prevent the reshipment to a point within the same state from having an independent and intrastate character." (*Gulf, Colorado & Santa Fe Ry. Co.* v. *Texas*, 204 U. S., 403, cited.)

In this case coal was shipped by the Clark Coal & Coke Company from points in Illinois to Davenport, Iowa, where the Clark Coal & Coke Company operated

a branch, and from Davenport, the coal was reshipped in the same cars to local points in Iowa. The Chicago, Milwaukee & St. Paul Railway Company claimed before the Railroad Commission of Iowa and before the Supreme Court of Iowa, just as the Baltimore & Ohio Southwestern Railroad Company is claiming here, that the transportation from Davenport was a part of the interstate movement from the original points in Illinois to the ultimate destination in Iowa, but the Supreme Court held:

> "That shipments of coal when reshipped, after arrival from points without the state and acceptance by the consignees, to points within the state on new and regular billing forms, constituted intrastate shipments and were subject to the jurisdiction of the State Railroad Commission."

The Supreme Court, in the above case, squarely held that the subsequent shipments from Davenport, after acceptance by the consignees and reshipment on new and regular billing forms, constituted intrastate shipments, subject to the jurisdiction of the Iowa State Railroad Commission. The Supreme Court stated:

> "The question is with respect to the nature of the actual movement in the particular case."

That this is the correct interpretation to be placed upon this decision is also shown by the Twenty-eighth Annual Report of the Interstate Commerce Commission, page 173, where, under the heading, "Termination of Interstate Transportation," we find the following:

> "In *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Iowa,* 223 U. S., 334 (*decided April* 13, 1914), it was held that an order of the State Railroad Commission requiring a railroad company to accept, without unloading and reloading into its own cars, reshipments of coal in carload lots when tendered in the cars of other railroad companies, by which the coal had been brought into the state, does not in-

terfere with interstate commerce where there is such a termination of the interstate transportation at the point of reshipment that the further transportation is purely an intrastate service."

In the case of *Talcott* v. *Southern Pacific Co.* (*decided February* 18, 1915), 33 I. C. C. Rep., 292, complainant attacked the charge of $1,260 collected by defendant for a special train from Yuma to Tucson, Arizona, alleging that it was unreasonable to the extent that it exceeded $880. The train was chartered on the morning of July 25, 1912, to expedite the arrival of a specialist summoned by the complainant by telegraph from Los Angeles. The physician left Tucson with a through ticket over defendant's line to Los Angles and without knowledge that a special train would be provided, the decision to use the same being while he was well on his way. The tariff charge for the special train was 125 fares. Complainant was allowed $7.60 for the unused portion of the ticket. The question is, whether the journey from Yuma to Tucson was part of an interstate journey or an intrastate journey beyond the jurisdiction of the commission. Unquestionably it was the intention of the physician to make the journey continuously from Los Angeles to Tucson on the regular train. The journey by special train from Yuma to Tucson was under a new contract subsequent to his own between defendant and complainant and without his knowledge or request. *Held:* When the physician left the regular train and boarded the special train at Yuma, his contract with defendant ceased, and the charge imposed for the special train from Yuma to Tucson is beyond the commission's jurisdiction.

In *The Kanotex Refining Company* v. *Atchison, T. & S. F. Ry. Co.* (*decided June* 8, 1915), 34 I. C. C. Rep., 271, reaffirmed, *Kanotex Refining Company* v. *Atchison,*

T. & S. F. Ry. Co. (*June* 13, 1917), 46 I. C. C. Rep., 495, the facts, as stated by the Commission, were these:

> "From its refinery at Caney, in the state of Kansas, the complainant ships petroleum oil to its various distributing stations in that and the adjoining states. One of its more important stations is at Woodward, in the state of Oklahoma, to which point the complainant ships its refined petroleum with regularity and in substantial volume. Kiowa is the last point on the rail of the defendant in the state of Kansas that is intermediate to Woodward, and in order to take advantage of the substantial lower rates prescribed in that state on refined petroleum, and as the first step in the carriage of the products of its refinery to Woodward, the complainant devised the plan of billing its tank cars to one L. B. Hill at Kiowa. Hill was the agent of the complainant for the sole purpose of acting as the consignee of such shipments and of rebilling them from Kiowa to Woodward. He performed no other duty for the complainant except to pay the freight charges on occasional shipments at the interstate rate from Kiowa to Woodward; and in such cases he was of course reimbursed by the complainant. In all cases the charges from Caney to Kiowa at the local state rate were paid by the complainant; and the charges at the interstate rate from that point to Woodward, when not advanced by Hill on behalf of the complainant, were collected directly from the complainant at destination."

It was frankly admitted of record that the complainant's cars were billed to Kiowa and then rebilled to Woodward, under the arrangement with Hill for the sole purpose of securing the transportation at the latter point at a lower aggregate cost than was available under the lawfully published through interstate rate from Caney to Woodward, that Woodward was the intended destination of the shipments, although they were first billed to Kiowa; and that the cars were expected to move to Woodward as a continuous shipment, subject only to

the delay incident to the rebilling at the intermediate point. As a matter of fact, the cars were sometimes actually handled from Caney through to Woodward in the same train. There was at Kiowa no transfer of interest, no actual possession taken by Hill, and no constructive possession other than may be involved in the rebilling at Kiowa as described.

The position of the defendant in rendering its undercharge bills against complainant was, that all shipments made from Caney, Kan., to Woodward, Okla., whether or not they were consigned to Kiowa, Kan., and reshipped from there to Woodward, are interstate shipments and should pay the interstate rate on file with Interstate Commerce Commission as the only lawful rate applying upon the transportation of commodities between those points.

The position of the complainant was, that the rate between Caney, Kan., and Kiowa, Kan., fixed by the Legislature of Kansas and adopted by the defendant as its intrastate rate between those points, was available to complainant in the same measure that it was available to any other shipper making shipments from Caney to Kiowa; that defendant had no right to discriminate between complainant and other shippers if complainant elected to make its shipments from Caney to Kiowa, paying the lawful intrastate rate to that point, taking possession of the shipment either physically or constructively at Kiowa, and then reshipping from there to Woodward upon the lawfully published rate applying to all shipments between those points which were open and available to every other shipper at Kiowa; that unless complainant be permitted by defendant to do this, it was discriminated against; and that if defendant was dissatisfied with the rate in effect from Caney to Kiowa,

Kan., on the ground that it was unreasonably low or confiscatory, defendant's remedy was by taking the matter before the proper tribunals within the state of Kansas to have the matter adjudicated, but that the defendant could not refuse to permit complainant to make use of the rates as it had in shipping to itself at Kiowa and reshipping from there to itself at Woodward, Okla.

The Commission held:

> "The lawfully interstate rate applies on shipment first billed to an intermediate point within the state of origin and then rebilled to the intended destination in an adjoining state, this plan having been devised for the sole purpose of getting the traffic through to the interstate destination at the rates applicable to and from the intermediate point, the sum of which was materially less than the through rate for the through service."

We can not subscribe to the opinion of the Interstate Commerce Commission in this case. There can be no question but what the complainant had the legal right to ship to Mr. L. B. Hill, its agent, or any one else at Kiowa, Kan., and that, having entered into a contract of shipment, that the legal rate applying upon that contract, as the measure of the compensation to which the defendant was entitled for performing the service was a lawful transaction. If Mr. Hill had shipped these same goods to another consignee in Kansas located upon defendant's line of railway at the Kansas statute rate, no question would or could have been raised by either complainant or defendant as to the legality of the two transactions.

In the case of *Savannah Bureau of Freight* v. *Charleston S. R. Ry. Co.*, 7 I. C. C. Rep., 601, the Interstate Commerce Commission said:

> "The complaint was that the through rate charged by the defendants from Charleston to Savannah exceeded the sum of the local rates established

by the Railroad Commission of South Carolina and Georgia. It appeared that such was the fact, notwithstanding which this Commission held that the through rate was just and reasonable. Let us assume, now, that the through rate from Charleston to Savannah established by the Atlantic Coast Line was $6, while the rate from Charleston to the state line was $3, and from the state line to Savannah $2. It is apparent that if a passenger applied to a railroad company at Charleston for a ticket to Savannah, that company must sell him a through ticket for $6, and would have no right to sell him two local tickets for $5, for that would be an invasion of its published tariff rates.

Upon the other hand, this Commission has stated in its affirmative rulings, and now repeats, that the passenger may properly pay his fare from Charleston to the state line and again from the state line to Savannah, although he thereby obtains transportation between these two points for less than the published through rate, and although he does so, knowing that he is to go from Charleston to Savannah, and deliberately seeking this means of obtaining transportation at less than the through rate.

The reason for this is not the intent of the parties but the actual transportation must be regarded, as was held by the United States Supreme Court in *Gulf, Colorado & Santa Fe Ry. Co.* v. *Texas,* 204 U. S., 403, involving the transportation of a carload of grain from a point in North Dakota to a point in Texas, at a rate from the point of origin to Texarkana to destination, which, when combined, were less than the through rate. The Charleston & Savannah Railroad Company sells to all the world tickets from Charleston to the state line for $3, and again from the state line to Savannah for $2. A passenger may purchase his ticket to the state line, and when he arrives there *that contract for transportation is at an end.* He now purchases another ticket from the state line to Savannah and a new contract of transportation begins. If the regulations of the railroad company permit, he may, instead of purchasing a ticket, pay his cash fare upon the train, to the same effect. He has, indeed, se-

cured transportation for less than the through rate; but has done so by putting together *two local transportations at the local rates.*"

The case of *Gulf, Colorado & Santa Fe Ry. Co.* v. *Texas*, 204 U. S., 403, referred to in the beginning of this brief, is a case on all fours with the present case, and, therefore, rules the present case. For the convenience of the court, the facts in that case are repeated, which briefly are as follows:

"The Samuel Hardin Grain Co. of Kansas City, Mo., offered to sell Saylor & Burnett, at Goldthwaite, Tex., No. 2 mixed corn at 86½c a bushel for delivery on railway track at Goldthwaite, and this offer was accepted for two carloads of corn. The Hardin Grain Co. did not at that time have the corn, but contracted with the Harroun Commission Co., of Kansas City, for the purchase of two cars of corn to be delivered to Texarkana, Tex., to the Hardin Grain Co. These cars were shipped from Hudson, S. D. The receiving carrier at Hudson was the C., M. & St. P. Ry. Co., who issued bills of lading consigned to Forrester Bros., Texarkana, Tex. The shipment was made in cars of the C., M. & St. P. Ry. Co., care the Kansas City Southern Railway, at Kansas City, with the privilege to stop the corn at Kansas City for inspection and transfer. The freight rate of 14c per 100 pounds was prepaid from Kansas City to Texarkana, the rate of 18c per 100 pounds from Hudson, S. D., to Kansas City having been paid by the Hardin Company upon its arrival for inspection. The minimum interstate rate from Hudson to Goldthwaite was 46c per 100 pounds, which would have been apportioned as follows: 18c from Hudson to Kansas City, and 28c from Kansas City to Goldthwaite, Tex. The G., C. & S. F. Ry. Co., the T. & P. Ry. Co. and the Kansas City Southern Ry. Co., together with the other connecting lines from Kansas City to Goldthwaite, had established a joint tariff of 35c per 100 pounds on shipments from Kansas City to Goldthwaite via Texarkana and originating in Kansas City, had agreed upon a division of that rate between them, and had filed tariffs es-

tablishing such rates with the Interstate Commerce Commission, and by such steps had brought itself within the provisions of the interstate commerce laws."

The Hardin Grain Company's officers kept themselves informed of the Interstate Commerce Commission freight rates and of the state commission rates, and the reason why they contracted for the corn to be delivered at Texarkana was because they could fill their contract with Saylor & Burnett at Goldthwaite at about 1½c per bushel cheaper than they could if they bought the corn for delivery to them at Kansas City and had it shipped from Kansas City to Goldthwaite. The Harroun Commission Company informed the Hardin Grain Company that the corn to fill the latter's order had been loaded to start to Texarkana, and requested instructions as to how the corn should be shipped from Texarkana for the guidance of F. L. Atkins, their agent at that place, who would attend to such reshipping for the Hardin Grain Company, as per former understanding.

Thereupon, in compliance with such request, blank bills of lading were made out by the Hardin Grain Company in Kansas City and furnished to the Harroun Commission Company, to be forwarded to F. L. Atkins. These bills of lading were to be executed by the T. & P. Ry. Co. and F. L. Atkins, as agent for the Hardin Grain Company, and were for shipment of the corn to Goldthwaite, Tex., consigned to "shippers' order, notify, etc." Neither the Hardin Grain Company nor the Harroun Commission Company had any store or warehouse at Texarkana, but under the agreement between the two companies, F. L. Atkins, who was the agent of the Harroun Commission Company, stationed at Texarkana, reshipped the corn at Texarkana for the Hardin Grain Company to Goldthwaite, Tex., over the Texas & Pa-

cific Ry. Co. and the G. & S. F. Ry. Co. at the rate of transportation applying from Texarkana to Goldthwaite.

If, in the *Goldthwaite case,* Saylor & Burnett had bought the corn from the Harroun Commission Co., delivered f. o. b. cars at Hudson, S. D., it could not have been discriminated against thereby by refusal of the carriers to do exactly what they did for the Harroun Commission Co. and the Hardin Grain Co. and themselves. Is it probable, and could the proposition be sustained, that it required three parties to get the advantage of a lower cost of transportation that the court noticed in the Goldthwaite case, and that one party making identically the same contracts would have been denied that advantage? We do not think so and we do not believe that the court in this case will make any such distinction.

It will, therefore, be seen from the above statement of facts that the only difference between that case and the instant case is, that in the Goldthwaite case the interstate transportation from Hudson, S. D., to Texarkana, Tex., was performed prior to intrastate transportation; whereas in the instant case, the intrastate transportation was performed prior to the interstate transportation. Mr. Justice Brewer, who delivered the opinion in the Goldthwaite case, said:

> "The single question in the case is whether, as between Texarkana and Goldthwaite, this was an interstate shipment. If so, the regulations of the State Railroad Commission do not control and the court erred in enforcing the penalty. If, however, it was a purely local shipment, the judgment below was right and should have been sustained. * * *
>
> The corn was carried from Texarkana, Tex., to Goldthwaite, Tex., upon a bill of lading, which, upon its face, showed only a local transportation. It is,

however, contended by the railroad company that this local transportation was a continuation of a shipment from Hudson, S. D., to Texarkana, Tex. That the place from which the corn started was Hudson, S. D., and the place at which the transportation ended was Goldthwaite, Tex.; and that such transportation was interstate commerce, and that its interstate character was not affected by the various changes of titles or issues of bills of lading intermediate its departure from Hudson and its arrival at Goldthwaite.

It is undoubtedly true that the character of a shipment, whether local or interstate, is not changed by a transfer of title during the transportation. But whether it be one or the other may depend upon the contract of shipment. The rights and obligations of the carriers and the shippers are reciprocal. The first contract of shipment in this case was from Hudson to Texarkana. During that transportation a contract was made at Kansas City for the sale of the corn, but that did not affect the character of the shipment from Hudson to Texarkana. It was an interstate shipment after the contract of sale as well as before. In other words, the transportation which was contracted for, and which was not changed by any act of the parties, was transportation of the corn from Hudson to Texarkana—that is, an interstate shipment. The control over goods in process of transportation, which may be repeatedly changed by sales, is one thing; the transportation is another thing, and follows the contract of shipment until that is changed by the agreement of the owner and carrier. Neither the Harroun nor the Hardin Company changed or offered to change the contract of shipment or the place of delivery. The Hardin Company accepted the contract of shipment theretofore made, and purchased the corn to be delivered at Texarkana—that is, on the completion of the existing contract. When the Hardin Company accepted the corn at Texarkana, the transportation contracted for ended. The carrier was under no obligation to carry it further. It transferred the corn, in obedience to the demands of the owner, to the Texas & Pacific Ry. Co., to be delivered by it, under its contract with

such owner. Whatever obligations may rest upon the carrier at the terminus of its transportation to deliver to some further carrier in obedience to the instructions of the owner, it is acting not as carrier, but simply as a forwarder. No new arrangement having been made for transportation, the corn was delivered to the Hardin Company at Texarkana. Whatever may have been the thought or purpose of the Hardin Company in respect to further disposition of the corn was a matter immaterial so far as the completed transportation was concerned.

In this respect there is no difference between an interstate passenger and an interstate transportation. If Hardin, for instance, had purchased at Hudson a ticket for interstate carriage to Texarkana, intending all the while after he reached Texarkana to go on to Goldthwaite, he would not be entitled, on his arrival at Texarkana, to a new ticket from Texarkana to Goldthwaite at the proportionate fraction of the rate prescribed by the Interstate Commerce Commission for carriage from Hudson to Goldthwaite. The one contract of the railroad companies having been finished, he must make a new contract for his carriage to Goldthwaite, and that would be subject to the law of the state within which the carriage was to be made.

The question may be looked at from another point of view. Supposing a carload of goods was shipped from Goldthwaite from Texarkana, under a bill of lading calling for only that transportation, and supposing that the laws of Texas required, subject to penalties, that such should be carried in a particular kind of car—can there be any doubt that the carrier would be subject to the penalty, although it should appear that the shipper intended, after the goods had reached Texarkana, to forward them to some other place outside the state? To state the question in other words—if the only contract for shipment was for local transportation, would the state law in respect to the mode of transportation be set to one side by the Federal law in respect to an interstate transportation, on the ground that the shipper intended, after the one contract of shipment had been completed, to forward the goods to

some place outside the state? *Coe* v. *Errol*, 116 U. S., 517-527.

Again, it appeared that his corn remained five days in Texarkana. The Hardin Company was under no obligation to ship further. It could, in any other way it saw fit, have provided corn for delivery to Saylor & Burnett, and unloaded and used that car for corn in Texarkana. It must be remembered that the corn was not paid for by the Hardin Company until its receipt in Texarkana. It was paid for on receipt and delivery to the Hardin Company. Then, and not until then, did the Hardin Company have full title to and control of the corn, and that was after the first contract for transportation had been completed.

It must further be remembered that no bill of lading was issued from Texarkana to Goldthwaite until after arrival of the corn at Texarkana, the completion of the first contract for transportation, the acceptance and payment by the Hardin Company. In many cases it would work the grossest injustice to the carrier if it could not rely on the contract of shipment it has made, know whether it was bound by the state or Federal law, or, obeying the former, find itself mulcted in penalties for not obeying the law of the other jurisdiction, simply because the shipper *intended a transportation* beyond that specified in the contract. It must be remembered that there is no presumption that a transportation when commenced is to be continued beyond the state limits, and the carrier ought to be able to depend upon the contract which it has made, and must conform to the liabilities imposed by that contract."

While further authorities might be cited, we deem it unnecessary in view of the fact that under a similar state of facts this decision of the United States Supreme Court has never been reversed, overruled or modified, and the Interstate Commerce Commission itself has followed it as stating the law under similar circumstances.

Another line of cases involving a different state of facts show that where the carrier performs the service of reshipment that it becomes an illegal device. For example, in the instant case, if complainant had made out its bill of lading and sent it to the agent of the Santa Fe road at Kiowa, Kan., so that the railroad company would itself have performed this service, it then would have been an illegal transaction for both complainant and defendant to engage in; but where the two transactions were performed by separate agencies, that is, no collusion between the shipper and the carrier, it became a perfectly legal transaction.

The shipper had the right to take his goods to Kiowa and ship them from there to Woodward, the same as the passenger had the right to buy his ticket or pay his fare, to have himself transported to the state line, and then buy another ticket or pay his fare from the state line to Savannah, as referred to above. And this must be so, because, had L. B. Hill, the merchant, bought the goods from complainant and had them shipped to Kiowa, taking them into his possession, either physically or constructively, and then shipped them forward to any other point to any other consignee in Oklahoma, there would have been no question about the legality of the transaction.

The question of the intent of the shipper, therefore, can not govern, but the matter is governed by the things actually done, which were (1) a contract for shipment from Caney to Kiowa, and constructive receipt of the shipment at Kiowa, and (2) a new contract of shipment entered into for transportation from Kiowa to Woodward. Those two independent contracts of shipment were the things done, which the parties had a right to do and which must control the rate of the freight paid.

The fact that some of the cars in question were not taken out of the through train, if it be a fact, is of no importance. It is well known, as the court said in the *Goldthwaite* case, that the title to property often changes while the property is en route. And whether the title of the property changes or not is immaterial. The contract of shipment entered into between the shipper and the carrier must control, for, as pointed out, otherwise the carrier itself would have no protection, could not presume to know the intent of the shipper, and had a right to rely upon the contract of shipment entered into to make its provisions accordingly.

The next case involving a similar state of facts is *Mutual Oil Company* v. *Atchison, T. & S. F. Ry. Co.* (*decided* June 8, 1915), Unreported Opinion of the Interstate Commerce Commission No. 6846, which case was argued with *Kanotex Refinery Co.* v. *A. T. & S. F. Co., supra,* and did not differ from it at all in principle or materially in the facts involved. The ruling of the Interstate Commerce Commission was the same as that in the *Kanotex Refinery case, supra,* and our dissention thereto is the same as in the *Kanotex Refinery case.*

In *Merchants Exchange of St. Louis* v. *Baltimore & O. S. W. Rd. Co.* (*decided* June 14, 1915), 34 I. C. C. Rep., 341, the Interstate Commerce Commission held that:

> "While reshipping or proportional rates are applicable to part of a through but suspended movement from point of origin to ultimate destination, outbound local rates, although they may likewise apply to part of a through movement, can not be limited according to the point of origin of the shipment or the rates which were paid inbound. So long as there are intrastate rates published to St. Louis, shippers can not be denied the right to avail themselves of these rates for movements which are clear-

ly intrastate, and so long as there are flat rates published out of St. Louis, shippers must be permitted, in proper cases, to ship outbound under these rates irrespective of the rates paid inbound. It is plain that the intrastate movement to St. Louis must be considered as a separate movement which can not be tied up to the outbound movement in such a manner as to constitute the two one through movement, provided the consignee has in good faith taken possession." (*Gulf, Colorado & Santa Fe Ry. Co.* v. *Texas*, 204 U. S., 403; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Iowa*, 233 U. S., 334, relied upon.)

This decision by the Interstate Commerce Commission is surprising in view of the fact that it was rendered a week after the decision by that tribunal in the *Kanotex case* and *Mutual Oil case, supra.*

In *Pennsylvania Ry. Co.* v. *Clark Bros. Coal Mining Co.* (*decided* June 21, 1915), 238 U. S., 456, 35 Sup. Ct. Rep., 896, 59 L. Ed., 1406, the United States Supreme Court held that the jurisdiction of the Interstate Commerce Commission is determined by the initial character of the commerce in question. What is to determine the initial character of any shipment it is not the conduct of the shipper and of the carrier with reference to that shipment as reflected in their mutual contract for transportation, either expressed or implied? That this contract exists until it is mutually terminated by the parties thereto and neither party thereto may arbitrarily vary its terms is too elementary to require any comment. In the case at bar the contract of shipment that was entered into by the parties called for transportation to Oakley, Ohio, which was terminated by the railroad company delivering the traffic to the consignee at that point in accordance with its terms, and the consignee paying the lawfully published rates applicable thereto. How can the B. & O. S. W. Rd. Co. treat a contract which

calls for transportation to Oakley, Ohio, as one for transportation to Madisonville, Ohio?

In the proceeding entitled *In the Matter of Rates, etc., Governing the Transportation of Railroad Fuel, etc.* (*decided* July 7, 1915), 36 I. C. C. Rep., 18, the Interstate Commerce Commission said:

> "It is well settled that the character and nature of the movement of the traffic, that is, whether the movement is a through or local movement and not the mere incidents of billing, determine the nature of the commerce and the rate applicable." (*Southern Pacific Terminal Co.* v. *I. C. C.*, 219 U. S., 498; *Ohio R. R. Commission* v. *Worthington*, 225 U. S., 101; *T. & N. O.* v. *Sabine Tram Co.*, 227 U. S., 111; *Baer Bros.* v. *D. & R. G. R. R.*, 233 U. S., 479; *R. R. Commission of La.* v. *T. & P. R. R.*, 229 U. S., 336; *Ill. Cent. R. R.* v. *La. R. R. Commission*, 236 U. S., 157; *Kanotex Refining Co.* v. *A., T. & S. F. Ry. Co.*, 34 I. C. C., 271, cited.)

To this opinion we subscribe but insist that the contract for transportation, either express or implied, between the shipper and the carrier is indicative of the character and nature of the movement of the traffic.

The next case decided involving the principle contained in the case at bar was *Brown* v. *Terre Haute, I. & E. Traction Company* (*decided* December 16, 1915), 110 N. E., 703, in which the Appellate Court of the State of Indiana held that the statutes of that state (Act March 6, 1911, Laws 1911, c. 225, Section 1, and Act March 9, 1907, Laws 1907, c. 341, Sections 3*g*, 7, 13, 14*a*, 14*b*), making it unlawful for a carrier to charge, demand or collect any rate or charge different from that fixed in the tariff schedule, or by means of any special rate, rebate, etc., or to charge or receive a greater or less fare from one person than it charges or receives from any other person for like transportation, and making it unlawful for any person to intentionally accept or receive such a

rebate, *does not prohibit a passenger from making his journey by stages regardless of his motive for so doing,* and where both local and through rates are included in the schedule of fares duly posted and published and the sum of the local fares makes less for the through passage, *he may make his journey by stages in order to get the benefit of the local fares* and the fact that he *alights* at the point to which the first local fare covers his transportation is of no controlling importance *except to show that he stands on his right to take advantage of the local fare.*

The next case decided involving the principle contained in the case at bar was *Kempner* v. *Missouri, K. & T. Ry. Co.* (decided December 21, 1915), 37 I. C. C., 396, wherein it was alleged that the defendant's rate of 51 cents per 100 pounds, for the transportation of five carloads of cotton junk from Greenville, Tex., to Galveston, Tex., for export, was unreasonable. It is stated that before the shipments were made complainant's representative inquired of the defendant's agent at Greenville relative to shipping this grade of cotton and was informed that a rate of 12 cents per 100 pounds would apply to Houston on "cotton junk" but that the rate on cotton junk would not apply to Galveston. The shipments accordingly were billed to Houston, order notify, on local bills of lading, and advance charges were paid at a rate of 12 cents. Later they were reconsigned to Galveston. Additional charges were collected at destination, based on the through rate of 51 cents per 100 pounds. The charges were paid under protest, whereupon complainant took possession of the shipments, transported them to her warehouse, paid the drayage charges upon it, opened the sacks, separated the worthless cotton and foreign matter from the marketable cotton, dried the remaining part and had it reginned and baled at a near-by

gin. The rebaled cotton remained in complainant's possession for about four or five months before it was drayed at the complainant's expense, to ship side and transported to foreign destinations. The bills of lading issued at Greenville did not show any destination beyond Houston, and *when the shipments were reconsigned to Galveston the carrier was not informed that the shipments were intended for export.* The 51 cent rate was applied.

Defendant contends that the intrastate rate was applicable, but complainant argues that the movement was interstate commerce, because there was no market at Galveston for cotton of the grade involved and because the shipments were subsequently reshipped to a foreign market.

Held, that the manner in which these shipments were handled rendered them *intrastate* to Galveston. (*G., C. & S. F. Ry. Co.* v. *Texas,* 204 U. S., 403; *Big Canon Ranch Co.* v. *G., H. & S. A. Ry. Co.,* 20 I. C. C., 523; and *Johnson* v. *M., St. P. & S. Ste. M. Ry. Co.,* 22 I. C. C., 255, cited.) The complaint accordingly was dismissed for want of jurisdiction, which decision is eminently sound.

The next case in order is *Southern Railway Company* v. *Prescott,* 240 U. S., 632, 639, 60 L. Ed., 836, 36 Sup. Ct. Rep. 469 (*decided April* 10, 1916).

The point involved in that case is, whether the arrival of an interstate shipment at destination, the payment of the freight charges by the consignee, his signature to a receipt for the shipment, and his removal of a part of the goods, leaving the rest, with the carrier's permission, to meet his convenience in removal, discharges the carrier's contract set forth in the bill of lading. The Supreme Court held that the contract had not been discharged, the actual service in holding the goods con-

tinued, and that reference must be had to the bill of lading to determine the legal obligations attaching to that service. The court further held that inasmuch as the bill of lading stated that after the expiration of the 48 hours, after notice of the arrival of the goods had been sent, the liability of the carrier would be that of a warehouseman, and that the goods so held would be subject to a reasonable charge for storage as specified in the carrier's published tariff, the terms of the bill of lading governed. The goods were destroyed within the 48-hour free-time period allowed by the contract of shipment.

The decision in this case is eminently sound, and applies with equal force to carload traffic which is left in the carrier's possession for a longer period than the prescribed free time for unloading. After the expiration of the prescribed free time the carrier would be liable as a warehouseman and not as a common carrier. Suppose in the case at bar that the lumber of the defendants had burned or was otherwise destroyed while in the cars of the plaintiff on the public team track at Oakley after the expiration of the forty-eight hours free time allowed for unloading, would the railroad company, under the logic of *Southern Railway Company* v. *Prescott, supra,* be liable as a common carrier or as a warehouseman? The uniform bill of lading under which all interstate shipments move and under which the traffic involved in the case at bar moved, contains the following provision:

> "Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to the carrier's responsibility as warehouseman only, or may be, at

> the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage."

No provision could be more clear. The plaintiff's duty and responsibility as a common carrier ended after the expiration of forty-eight hours after notice of the arrival of the goods had been sent or given and thereafter its status was that of a warehouseman only. After that time the goods were no longer in transit.

The only reason that the demurrage charge, which the carrier assesses after the expiration of the free time allowance, is treated as a part of the interstate charges is because Congress recognized that undue preferences and discriminations might arise through the detention of the carrier's equipment at the terminal and, therefore, defined the term "transportation" to include "all services in connection with the receipt, delivery, * * * storage and handling of property transported." And it is not unsafe to assume that in the absence of this congressional action on the subject, that the storage performed by carriers after the expiration of the free time period and the charges assessed therefor, would be considered as conditions subsequent to the transportation and subject to state control.

The following extract from the opinion of the Supreme Court by Mr. Justice Hughes in *Southern Railway Company* v. *Prescott, supra,* is interesting:

> "By the act to regulate commerce (Section 1) the 'transportation' it regulates is defined as including 'all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. [34 Stat. at L., 584, chap. 3591, Comp. Stat. 1913, Section 8563.] It is made

the duty of the carrier 'to provide * * * such transportation upon reasonable request therefor.' All charges made for 'any service' rendered in such transportation must be 'just and reasonable.' Section 6 requires that the carrier's schedules, printed as provided, 'shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee.' And it is further provided, in the same section, that no carrier shall 'extend to any shipper or person any privileges or facilities in the transportation'—that is, as defined—'except such as are specified in such tariffs.' The bill of lading in accordance with the published regulations provided that 'every service' to be performed under it, including the service of the connecting or terminal carrier, should be subject to the conditions specified, and among these was the express condition governing the company's responsibility as warehouseman for property not removed within forty-eight hours after notice of arrival. Such a retention of the goods was undoubtedly a terminal service forming a part of the 'transportation' in the sense of the federal act and governed by that act. Thus, in the case of *Cleveland, C., C. & St. L. R. Co.* v. *Dettlebach,* 239 U. S., 588, *ante,* 177, 36 Sup. Ct. Rep., 177, it was held, with respect to goods lost through the negligence of the terminal carrier while in possession as warehouseman under this stipulation, that the provision of the bill of lading limiting liability to the declared value of the goods was applicable. The court deemed it to be evident 'that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of per-

forming such additional services, it enacted that so far as interstate carriers by rail were concerned, the entire body of such services should be included together under the single term 'transportation,' and subjected to the provisions of the act respecting reasonable rates and the like.' It is also clear that, with respect to the service governed by the federal statute, the parties were not at liberty to alter the terms of the service as fixed by the filed regulations. This has repeatedly been held with respect to rates (*Texas & P. R. Co.* v. *Mugg*, 202 U. S., 242, 50 L. Ed., 1011, 26 Sup. Ct. Rep., 628; *Kansas City Southern R. Co.* v. *Carl*, 227 U. S., 639, 652, 57 L. Ed., 683, 688, 33 Sup. Ct. Rep., 391; *Boston & M. R. Co.* v. *Hooker*, 233 U. S., 97, 112, 58 L. Ed., 868, 876, L. R. A., 1915B, 450, 34 Sup. Ct. Rep., 526, Ann. Cas. 1915D, 593; *Louisville & N. R. Co.* v. *Maxwell*, 237 U. S., 94, 59 L. Ed., 853, L. R. A. 1915E, 665, P. U. R. 1915C, 300, 35 Sup. Ct. Rep., 494), and the established principle applies equally to any stipulation attempting to alter the provisions as fixed by the published rules relating to any of the services within the purview of the act. *Chicago & A. R. Co.* v. *Kirby*, 225 U. S., 155, 166, 56 L. Ed., 1033, 1038, 32 Sup. Ct. Rep., 648, Ann. Cas. 1914A, 501; *Atchison, T. & S. F. R. Co.* v. *Robinson*, 233 U. S., 173, 181, 58 L. Ed., 901, 905, 34 Sup. Ct. Rep., 556. This is the plain purpose of the statute in order to shut the door to all contrivances in violation of its provisions against preferences and discriminations. No carrier may extend 'any privileges or facilities,' save as these have been duly specified. And as the terminal services incident to an interstate shipment are within the feedral act, and the conditions of liability while the goods are retained after notice of arrival are stipulated in the bill of lading under the filed regulations, the conditions thus fixed are controlling, and the parties can not substitute therefor a special agreement.

In determining, in this view, whether the contract had been discharged, and the case removed from the operation of the federal act, regard must, of course, be had to the substance of the transaction. The question is not one of form, but of actuality.

Texas & N. O. Co. v. *Sabine Tram Co.*, 227 U. S. 111, 126, 57 L. Ed., 442, 448, 33 Sup. Ct. Rep., 229; *Railroad Commission* v. *Texas & P. R. Co.*, 229 U. S. 336, 341, 57 L. Ed., 1215, 1218, 33 Sup. Ct. Rep., 837; *Illinois C. R. Co.* v. *De Fuentes*, 236 U. S., 157, 163, 59 L. Ed., 517, 519, P. U. R. 1915A, 840, 35 Sup. Ct. Rep., 275; *Pennsylvania R. Co.* v. *Clark Bros. Coal Min. Co.*, 238 U. S. 456, 458, 59 L. Ed., 1406, 1408, 35 Sup. Ct. Rep., 896. It is apparent that there had been no actual delivery of the nine boxes. The payment of the freight had no greater efficacy than if it had been made in advance of the transportation. The giving of a receipt for the goods by the consignee did not alter the fact that they were still held by the railway company, awaiting actual delivery. The transaction at most could not be deemed to accomplish more than if the parties had agreed that, until such delivery, the goods should be held under a special contract, in lieu of the prescribed conditions, and this they could not effect without violating the act which governed the shipment. It could not be said, for example, that while under the filed regulations the railway company was to make a 'reasonable charge for storage' pending delivery, that it could agree with a particular shipper, or consignee, to hold gratuitously; nor could it alter the terms of its responsibility while the goods remained undelivered. The actual service in holding the goods continued, and we must look to the bill of lading to determine the legal obligation attaching to that service."

After the expiration of the free time period, the cars were subject to the prescribing demurrage charge for the detention of the cars and, as alleged by the plaintiff in its petition, the defendants paid demurrage charges at the rate of $1 per car per day on all cars so held beyond the free time limit. This car-service charge, under the law, must continue to be assessed by the carrier until the cars are released from the transporting of interstate commerce. The question then arises, When are the cars released from the transportation of interstate

commerce? The answer is, at the time the goods are actually taken from the cars, and the equipment of the railroad company thereby released, or else, at the time when the consignee makes such disposition of the shipment as to amount to a constructive delivery of the shipment. In the case at bar, defendants paid to the carrier demurrage at the rate of $1 per car per day, on all cars that were held in the carrier's possession at Oakley, Ohio, beyond the free-time limit. This demurrage charge was properly assessable until the defendants contracted with the railroad company to move the traffic from Oakley, Ohio, to Madisonville, Ohio. *It was at that time that the interstate transportation ceased and the intrastate transportation began. The cars were released from interstate commerce contemporaneously with the formation of the contract for intrastate transportation. In other words, the cessation of the interstate transportation and the beginning of the intrastate transportation were simultaneous events.*

In the case of *Alabama Great Southern Ry.* v. *McFadden & Brothers* (*decided May* 25, 1916), 232 Fed. Rep., 1000, affirmed, *Alabama Great Southern Ry. Co.* v. *McFadden & Brothers* (*April* 26, 1917), 241 Fed. Rep., 562, 154 C. C. A. 338, the court, in holding that cotton shipped to a point within the state where the shipments originated, and there compressed and from thence carried to points without such state constituted interstate commerce, said:

> "I fail to see how the shipments from Albertville to Birmingham under the circumstances of the present case, can be construed as intrastate. The stoppage in transit for compression at Birmingham, the assembling of the cotton originating at Albertville with other cotton subsequently purchased at Birmingham and other points in Alabama, and the subsequent routing of the compressed cotton to

points determined by the defendants according to their trade contracts, do not relieve the shipments originating at Albertville and billed to Birmingham, and subsequently billed from Albertville or Attalla to New Orleans, of their character as interstate commerce. There was no change of ownership from the time the cotton left Albertville until its arrival at New Orleans. It was continuously in the possession, custody and control of the carrier, and the stoppage of the cotton at Birmingham for compression, still in the possession of the carrier, was merely for a service incidental to its transit over the entire interstate route."

In that case, uncompressed cotton was shipped from Albertville, Ala., and also from Attalla, Ala., to Birmingham, Ala., and subsequently reshipped to New Orleans, La., under a bill of lading reading either from Albertville or Attalla to New Orleans. The original bills of lading were surrendered when the cotton went forward from Birmingham, and new bills of lading issued in lieu thereof. In other words, there was a novation in the contract of transportation. In this case, the transportation of the cotton did not end at Birmingham, as the destination was not ascertained until it arrived at Birmingham; the stopping of the cotton at Birmingham was merely a delay of the commodity in transit for the purposes of compression. The published tariff of the carrier on file with the Interstate Commerce Commission named *a rate* of 57 cents per cwt., on cotton, from Albertville, Ala., to New Orleans, La., *which carried with it, as stated in the tariff, the right of the carrier to compress the cotton in order to reduce the bulk*, thereby making it more convenient to handle. The tariff further provided that the compression could be performed at points convenient to the carrier. This point was chosen by the carrier as Birmingham where it maintained a compressing point for that purpose, and the only reason the cotton was

stopped at that point was for compression. If the shippers had known when the cotton left Albertville that it was to be ultimately sold at New Orleans, they undoubtedly would have taken out a bill of lading calling for transportation from Albertville, Ala., to New Orleans, La. But, inasmuch as Birmingham was an assembling point as well as a compressing point, they took out a bill of lading from Albertville, Ala., to Birmingham, Ala., and then *modified their contract* with the consent of the carrier when the real destination was ascertained. If the shippers in this case had taken out one bill of lading from Albertville, Ala., to Birmingham, Ala., and paid the freight charges thereunder, and then taken out a new bill of lading calling for transportation from Birmingham to New Orleans, the writer feels confident that the decision in this case would have been different. Inasmuch as the movement from Birmingham to New Orleans was merely an extension of the movement from Attalla to Birmingham, as was clearly evidenced by the novation in the original contract for transportation whereby the *shippers received a bill of lading reading from Attalla to New Orleans,* logically there was but one rate to apply, and that was the published through rate of 57 cents per cwt. from Attalla to New Orleans, on file with the Interstate Commerce Commission.

As was stated by the Interstate Commerce Commission in the case of *Memphis Merchants Exchange* v. *Illinois Central Rd. Co.* (*March* 12, 1917), 43 I. C. C. Rep., 378, 388:

> "It must be apparent, however, that in the case of traffic moving under *transit tariffs providing for proportional or reshipping rates and other facilities or arrangements, dependent in their applicability upon a prior or subsequent movement to or from the transit point,* the intent of the parties must be measured not merely by the intent of one of the parties at the

time and place of shipments, but we must look to the fully ripened and completed intent *as expressed and executed* by the party controlling the movement of the traffic, whether it be the original consignor or consignee or the owner, who may be neither the original consignor nor consignee. The true and controlling intent which determines the essential character of the commerce *is not fully matured and fixed until the party who, having the right to do so, desides, under the option lawfully available to him under the transit tariffs, what is to be the final destination of the shipment.*

"In other words, the intent which is conclusive in determining the character of the completed transportation *is not fully expressed or indicated until it is decided whether the shipment will be disposed of locally or the transit tariff provisions availed of for a further movement, treating the whole as a continuous shipment at the lawful through charge,* however, made up; that is, whether at available combinations or joint through rates."

In the case of *United States* v. *Philadelphia & Reading Ry. Co.* (*decided May* 26, 1916), 232 Fed. Rep., 946, 949, the court said:

"The fact that the defendant was a carrier in interstate commerce over through routes part rail and part water is not sufficient to establish the fact that the certain carloads involved in this indictment were carried in interstate commerce. If, for instance, a shipment were made over the defendant's road from the coal regions in Pennsylvania to a point in New Jersey to a certain consignee, and that consignee, after delivery, reshipped from the point in New Jersey to another point in New Jersey under a new consignment to a different consignee, the interstate through rate from the coal region in Pennsylvania to the second point in New Jersey would not apply, but the intrastate rate would apply from the first to the second point in New Jersey. (*Citing Gulf, Colorado & Santa Fe Ry. Co.* v. *Texas*, 204 U. S., 403, 27 Sup. Ct. Rep., 360, 51 L. Ed., 540; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Iowa*,

233 U. S., 334, 34 Sup. Ct. Rep., 592, 58 L. Ed., 988; *Pennsylvania Rd. Co.* v. *Mitchell Coal & Coke Co.*, 238 U. S., 251, 35 Sup. Ct. Rep., 787, 59 L. Ed., 1293.)"

In the case of *Atchison, T. & S. F. Rd. Co.* v. *Harold* (*decided June* 5, 1916), 241 U. S., 371, 60 L. Ed., 1050, 36 Sup. Ct. Rep., 665, it was held that a carload of grain originally shipped from Yanka, Nebraska, consigned to Topeka, Kansas, to the order of the consignors, with a direction to notify, "care of Santa Fe for shipment," a grain company residing and doing business at Kansas City, Missouri, to which the bill of lading was indorsed with draft for the purchase price attached, must be deemed to have moved in a continuous interstate commerce shipment from the date of its departure from Yanka, Nebraska, to the termination of the transit over the Santa Fe Railroad from Topeka, Kansas, to Elk Falls, Kansas, under an exchange bill of lading which the grain company had obtained from the agent of the Santa Fe at Kansas City, consigning the identical car then still in transit to their own order at Elk Falls, and, therefore, the delivery of the car to the Santa Fe at Topeka for further movement was not a new and distinct shipment in interstate commerce.

A careful reading of this case clearly discloses that the facts therein are different from the facts in the case at bar. In the *Harold case*, without considering the unimportant fact that the car containing the grain was damaged en route, which necessitated the transfer in transit of the grain from the original car through an elevator to another car, the facts resolve themselves into a simple proposition. The car of grain was shipped from Yanka, Nebraska, on September 21, 1910, destined to Topeka, Kansas, the same having been purchased by

a grain company at Kansas City. Before the car reached Topeka, Kansas, the grain company resold the car of grain to a firm at Elk Falls, Kansas, and reconsigned the car to the latter point. This reconsignment took place while the car was en route to Topeka, Kansas, and the new bill of lading that was issued to the grain company by the Santa Fe agent at Kansas City was given *in lieu* of the original bill of lading, and in fact the substituted bill of lading contained the same shipping date as the original bill of lading. The car had not reached its destination, Topeka, and the original movement was not terminated in any sense of the word, and the action of the shipper in reconsigning the car while in transit to Elk Falls, with the acquiescense of the carrier, was simply a change in the original contract of shipment and their action amounted to a novation. As a matter of fact in the grain business, as it is conducted today, and under authority of reconsignment privileges contained in lawfully published tariffs, it is customary for a number of innovations to be made in the original contract of shipment before a consumer is obtained and delivery finally accepted. No one would contend that the successive changes in such original contracts of shipment amount to separate and distinct movements subject to separate and distinct rates, instead of being subject to one through rate from original point of origin of the traffic to its final destination where delivery is taken, They are usually consigned to hypothetical destinations in the expectation of disposing of them at the most favorable market along the route, *but at no such intermediate points is there, either physical or constructive, delivery taken and no freight charges are paid* until the actual destination is ascertained and reached.

In the case at bar there was no innovation in the orig-

inal contract of shipment, the cars reached their agreed and designated destination, the freight charges were paid, the terms of the shipping contract were fully completed by both shipper and carrier, constructive delivery was taken and the original transportation was terminated. The subsequent movement from Oakley, Ohio, to Madisonville, Ohio, was under new and independent contracts of shipment, wholly unrelated to the original contracts covering the movement into Oakley. The plaintiff treated the movement from Oakley to Madisonville as separate and independent and assessed its local state rate between such points.

In fact, on all of the cars which arrived at Cincinnati via the Louisville & Nashville Ry. and Cincinnati Southern Railway, the contracts covering the movement from Oakley, Ohio, to Madisonville, Ohio, were entered into by the defendants with an entirely different carrier, the plaintiff company. In other words, the original contracts were made between shippers and carriers entirely different from which the contracts from Oakley, Ohio, to Madisonville, Ohio, were made.

In the case of *Bracht* v. *San Antonio & Aransas Pass Railway Company* (*decided January* 3, 1921), 254 U. S. 489, 41 Sup. Ct. Rep., 606, 65 L. Ed., 366, the United States Supreme Court held that the liability of the initial carrier of goods consigned by a shipper to himself at a point within the state, where he intended to sell them, and shipped under an intrastate bill of lading that contained no reference to diversion or reshipment, is governed solely by such bill of lading, subject to any applicable rules and regulations prescribed by state authority, although, upon arrival at destination, at a point beyond such initial carrier's own line, the carrier then having possession of the goods forwarded them,

upon the shipper's request, made after arrival, to a point in another state, taking up the original bill of lading, and issuing an interstate one, and such initial carrier may not be held liable by virtue of the Carmack Amendment of June 29, 1906, to the Interstate Commerce Act of February 4, 1887, for damages sustained in the course of transportation beyond destination originally specified.

In the case of *Pere Marquette Ry. Company* v. *French & Company* (*decided January* 17, 1921), 234 U. S. 538, 41 Sup. Ct. Rep., 195, 65 L. Ed., 391, the United States Supreme Court held: The terminal carrier, by surrendering a car at destination to another carrier for further transportation, at the request of an employee of the latter, makes a disposal of such car in assumed termination and discharge of its obligations which, whether justified or not, is in legal contemplation, a delivery, although in forwarding the car it used the original waybill, striking out the original destination and substituting a new one on the line of the new carrier's road.

C. CONCLUSION.

In conclusion, it is contended that the determinative feature of any shipment is an agreement between the parties at the inception of the carriage, that the freight shall be transported to the point of destination; and, therefore, the character of a shipment as intrastate or interstate commerce depends solely upon such contract of transportation, either express or implied, which is entered into by the shipper and the carrier at the point of origin of the traffic, or such novation of the contract for transportation which may be agreed upon by the parties thereto while the goods are in transit; that the intention of the shipper with respect to the traffic can not govern, but the things actually done control its character.

That when on interstate shipment reaches the destination which is agreed upon in the contract of shipment, and the freight charges based upon the lawfully published rates applicable to such movement are paid, and delivery, either physical or constructive, is accepted by the consignee, the contract for transportation is terminated, all things having been done by both the shipper and the carrier that they are obliged to do under such contract for transportation.

That the subsequent movement of that commodity is a separate, distinct and independent movement, wholly unrelated to the prior movement and subject to a new and independent contract for transportation and at the lawfully published rates applicable thereto.

That where goods which have moved in interstate commerce have come to rest within the state and the contract of transportation is terminated, the subsequent

movement of those goods within the state constitutes intrastate commerce under the control and direction of that state.

In the case at bar, the shipments of lumber were received at southern points of origin under bills of lading or contracts of shipment for interstate movement to Cincinnati, Ohio. After the arrival of the cars at Cincinnati, the consignee paid the freight charges thereon based upon the lawfully published interstate rates applicable from such points of origin to Cincinnati, Ohio, as filed with the Interstate Commerce Commission, and then ordered the cars switched to Oakley, Ohio, where delivery was accepted by the consignee. (Inasmuch as Oakley, Ohio, is within the Cincinnati Switching Limits and accorded the same rates as enjoyed by the downtown districts of Cincinnati.)

It is, therefore, contended that when the defendants in this case paid the freight charges based upon the lawful interstate rates and accepted delivery of the lumber at Oakley, Ohio, the interstate contract for transportation was at an end, and that the subsequent movement of the lumber from Oakley, Ohio, to Madisonville, Ohio, constituted an intrastate movement under a new contract of transportation, wholly independent of the prior interstate movement and that, therefore, the freight charges properly assessable on such movement from Oakley, Ohio, to Madisonville, Ohio, are those based upon the state rate between such points as is lawfully on file with the Public Utilities Commission of Ohio.

That inasmuch as the defendants in this case have paid the lawful interstate rates from the points of origin to Oakley, Ohio, and the lawful state rate from Oakley, Ohio, to Madisonville, Ohio, it is contended that no undercharge exists.

It therefore follows that the judgment of the court below should be sustained and we accordingly ask that this error proceeding be dismissed at the cost of the plaintiff.

Respectfully submitted.

HARRY C. BARNES,
Attorney for Defendants in Error.

CHICAGO, OCTOBER 12th, 1922.